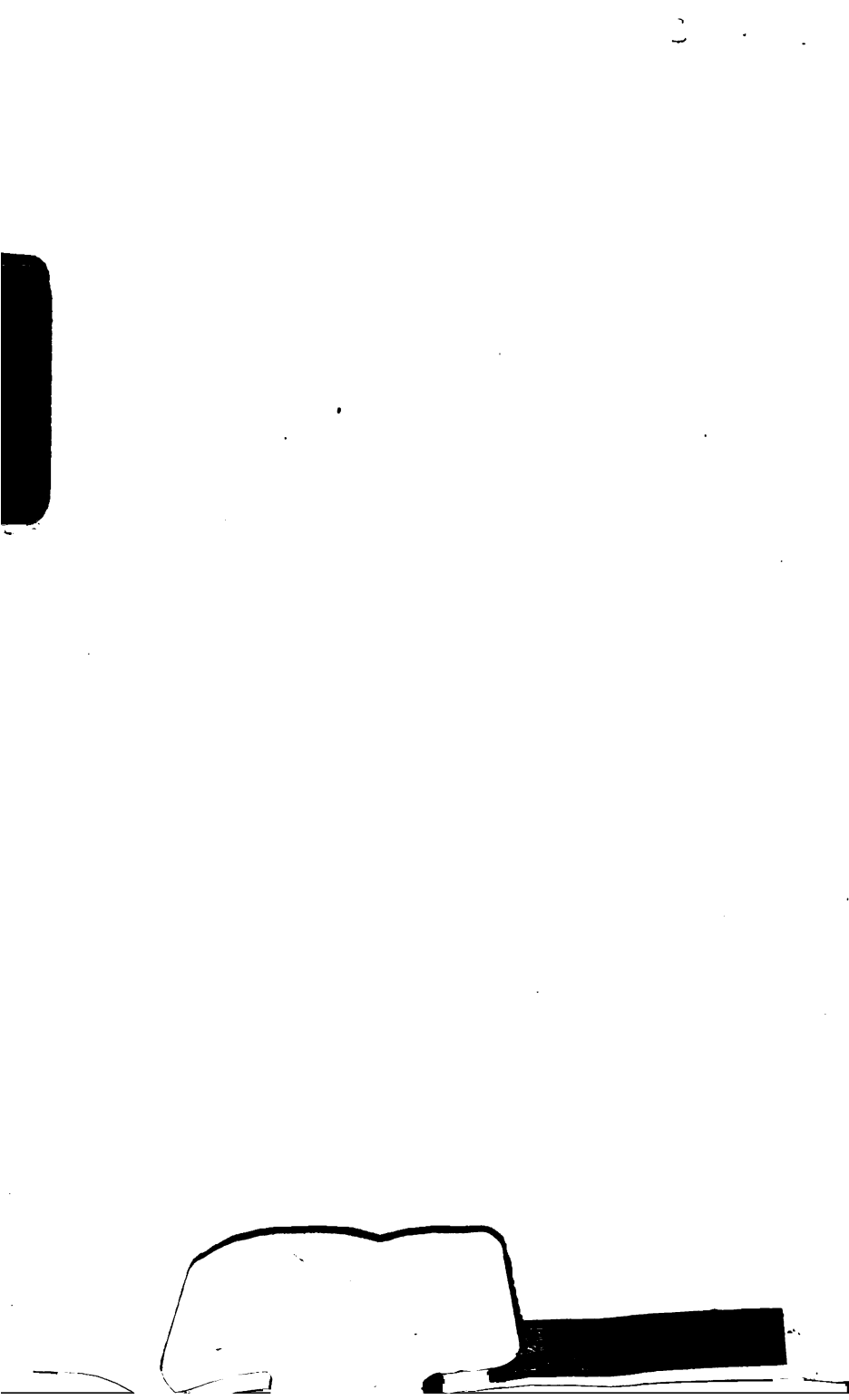

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A

FULL AND FAITHFUL

REPORT

OF THE

Proceedings

IN HIS MAJESTY'S

COURT OF EXCHEQUER

IN IRELAND,

IN THE CASE OF THE

HONORABLE MR. JUSTICE JOHNSON

CONTAINING THE

Arguments of Counsel,

AND THE

Opinions delivered from the Bench,

AS TAKEN FROM ORIGINAL DOCUMENTS:

WITH AN

APPENDIX,

COMPRISING

The Act of the 44th Geo. III. c. 92;—the Writ of Habeas Corpus, and Return thereto;—Copies of Letters written by Persons of high Rank in the Irish Administration;—the several Affidavits made in the Case;—an authentic Report of the Opinion delivered in the Court of King's Bench, on Mr. Justice JOHNSON's Case, by the Hon. Mr. Justice DAY;—and a

POSTSCRIPT.

THE WHOLE CAREFULLY REVISED AND CORRECTED

BY JOHN SWIFT EMERSON,

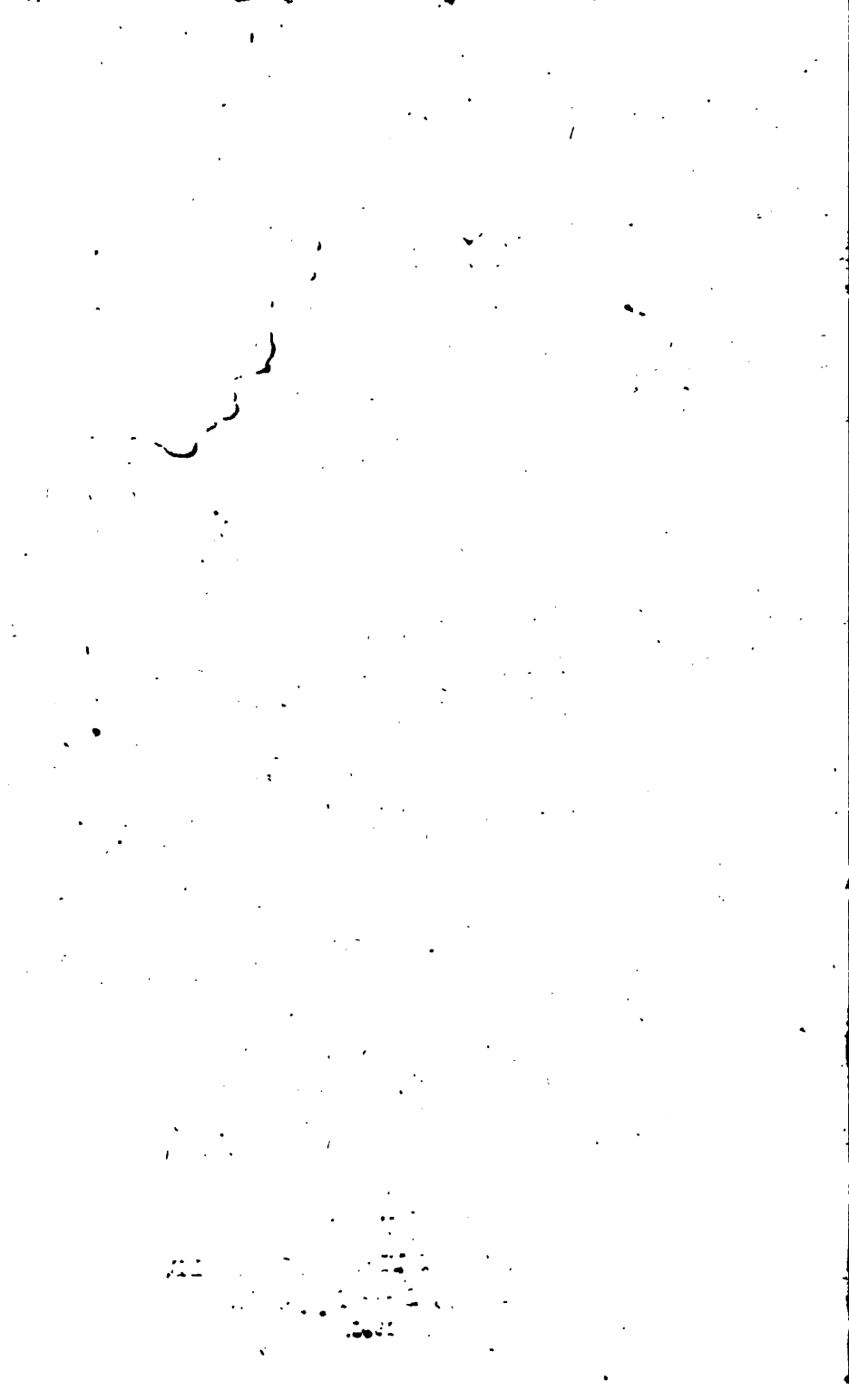
Solicitor to Mr. Justice JOHNSON.

Dublin:

PRINTED BY THOMAS BURNSIDE,

No. 10, Lower Liffey-street.

1805.



IN laying this Work before the Public, I have the satisfaction to state, that it has been compiled from Original and Authentic Documents: I beg leave, at the same time, to express my acknowledgements for the kind condescension of those learned and eminent Characters, by whose assistance I have been enabled to prepare a Full and Correct Report of a Case, which has so much and so justly interested the Attention of the People of Ireland.

J. S. EMERSON.

No. 48, *CAMDEN-STREET.*
April 8th, 1805.

The Reader is requested to correct the following ERRATA *in Mr. Burrowes's Argument:*

Page 12, line 9 from bottom, for *abstract*, read *abhorrent.*
—— 15, line 7 from bottom, for *these distinctions*, read *this distinction.*
—— 21, 1st line, for *any abuse*, read *every abuse.*
—— 22, line 4 from bottom, for *same*, read *former.*

Page 40, line 16 from bottom, for *was*, read *has.*
—— — line 5 from bottom, for *remedied*, read *remedial.*
—— 75, line 11 from bottom, after &c. insert "*shall escape, &c.*
"*shall be lawful for any Justice, &c. for any county, &c.*"

A

REPORT,

&c. &c. &c.

ON the 18th of January, Mr Juſtice JOHNSON was arreſted at his houſe in the County of Dublin, under a Warrant, ſigned "ELLENBOROUGH," and endorſed by J. BELL, a Magiſtrate of the County of Dublin, and ſaid to be ſo endorſed purſuant to the Statute 44 Geo. III. c. 92, it being the FIRST attempt to carry the ſaid Act into execution*.

The ſame evening a Writ of Habeas Corpus, at Common Law, was ſued out returnable immediate before the Chief Juſtice, who ordered the Parties to attend, and the return to be made on the next morning, Saturday the 19th, at 12 o'clock.

Saturday the 19th, the Party was brought before the Chief Juſtice, and the return made †.

The Chief Juſtice was aſſiſted by ſix of the other Judges. A ſeventh came on the laſt day of the argument. The Counſel of Mr. Juſtice JOHNSON then required time to conſider

* See Appendix, No. I. † Ibid. II.

conſider of the return, as it was of a very peculiar nature, no inſtance of a like kind having ever occurred before, and the return having been then inſtantly made. To this the Attorney General refuſed to conſent.

Mr. Juſtice JOHNSON then (though in a weak ſtate from ill-health) ſtated the following circumſtances of his caſe, to induce the Court to grant him time until the next day:—

He ſaid, it was true, that he had ſo long ago as early in the laſt ſummer, heard it reported that it was the intention of the King's Adminiſtration in Ireland, to charge him in England with ſome miſdemeanor, ſaid to have been committed there in the publication of certain papers, which were ſaid to be libellous. It was reported, that manuſcripts had been procured in England from the publiſher of the papers, which ſome perſons, ſaid to be acquainted with the hand-writing of Mr. Juſtice JOHNSON, would ſwear they *believed* to be of his hand-writing, and that, upon this evidence, ſuch a charge was intended to be brought againſt him. He had heard the ſame report, grounded upon ſimilar circumſtances of evidence, circulated with equal confidence, as to other perſons whoſe names were publicly mentioned by perſons ſuppoſed to form a part of the Adminiſtration. The circulation of theſe reports gave him no uneaſineſs, and indeed did not engage his attention. He did not perceive, from a peruſal of the publiſhed papers imputed to him, that they contained any matter which could involve the writer in any moral cenſure; and as to the cenſure of the law, as the law of the land THEN ſtood, and as the eternal principles of juſtice he hoped would always ſubſiſt, he was conſcious that he could not be charged in a place where the ſame law did not enable him to defend himſelf; and if he ſhould be charged where the law did enable him to defend himſelf, he was equally certain, from his own conſciouſneſs of the facts, that no ſuch charge could ſucceed; he remained, therefore, perfectly indifferent to the buſtle of theſe reports, and though in a very precarious ſtate of health, he went the Summer Circuit. After his return, his illneſs having increaſed, he was obliged to put himſelf under the care of phyſicians, and for above four months previous to his arreſt had been confined to his houſe, and under the neceſſity of having conſtant medical attendance.

attendance. In the month of September, Mr. Juſtice JOHNSON had been informed by a friend (who had juſt heard it reported) that the proſecution talked of was of a much more ſerious nature than had been at firſt imagined; for that he had been told, that a bill had been brought into Parliament, and had paſſed in the month of July laſt into a law, which by an *ex poſt facto* conſtruction would over-reach the fact (with which it pleaſed ſome people here to charge him) and under which it was intended to arreſt him in Ireland, to have him carried in cuſtody to England, and tried there; for the avowed purpoſe of depriving him of all means of defence, inaſmuch as it was ſaid that the act had, ſubſequently to the fact having been committed, erected a juriſdiction over his perſon to which he had not been before ſubject, and while it provided for the expenſe of his being tranſmitted into England, it provided no power by which he could ſummon one witneſs on his behalf from this country, where, as he certainly had reſided at the time the fact laid to his charge was committed, his defence could alone ariſe. It was added, that this act had been brought into Parliament by the brother-in-law of the perſon in whoſe name, and at whoſe inſtance, Mr. Juſtice JOHNSON was to be proſecuted. This account of the act appeared ſo extraordinary, that it was laid before Counſel for their conſideration: they were of opinion, that although the act was framed in a manner ſo looſe and inaccurate as to make the matter a queſtion of conſtruction; yet, that upon a fair interpretation of the law, it did not appear to include ſuch a caſe as that laid before them, but had for its objects only thoſe perſons, who having committed offences while they *reſided* in one part of the United Kingdom, had *eſcaped*, departed from it, or fled, in order to elude juſtice. This opinion, he ſaid, was doubly ſatisfactory: not only relieving his own caſe from a very oppreſſive operation of law, but alſo relieving the perſons above alluded to from the poſſibility of having it ſuppoſed that they had, in bringing the bill into Parliament, a particular caſe, in the event of which they were intereſted, in view. Mr. Juſtice JOHNSON ſaid, that ſoon after his illneſs increaſed ſo much, that he became utterly incapable of attending to any buſineſs, and continued in that ſtate until about the beginning of December laſt, when he began, in ſome degree, to recover, and his phyſicians ſtrongly recommended it to him to try (as ſoon as

any

any increaſe of ſtrength and a milder ſtate of the weather would enable him to travel) the effect of the water at Bath. About this time, a friend of his having happened to call on him, the ſubject of his going to Bath was mentioned; and he ſaid, he had apprehenſions, that if he ſhould go, ſome effort to arreſt his perſon, while there, might be made under this charge of a ſuppoſed miſdeamenor. His friend ſaid, he could not conceive, from the character of Lord HARDWICKE, that he would permit ſuch an advantage to be taken; and that he would himſelf either ſpeak to Lord HARDWICKE, or convey Mr. Juſtice JOHNSON's wiſhes, and expreſs his hopes that ſome aſſurance might be given that while his health compelled him to remain at Bath, he ſhould be permitted to continue there unmoleſted. This was accordingly done, and Mr. MARSDEN requeſted to apply to the Lord Lieutenant on the ſubject. About the 10th or 11th of December, Mr. MARSDEN ſent as an anſwer the following note*.

This note ſeemed to have conceded a favour of rather an extraordinary nature—namely, that if Mr. Juſtice JOHNSON ſhould, by cauſing bail to be put in render any arreſt of his perſon an act of falſe impriſonment; why then, indeed, he need not be under any apprehenſion of being arreſted. However, as the terms of the note ſeemed to allow a month's time for the performance of this liberal condition, no immediate anſwer was returned. Mr. MARSDEN, however, on the 13th of December thought proper to ſend the following note †.

This peremptory demand and threat, ſo ſoon following the above liberal offer, became ſerious, particularly in the enfeebled ſtate in which Mr. Juſtice JOHNSON ſaid he then was, and the great ſeverity of the weather; and accordingly the two notes were laid before Counſel to adviſe what ſhould be done. They were of opinion, that, as by giving bail in the manner demanded, all queſtion of the operation of the above-mentioned Statute upon the caſe would be given up, that a copy, if poſſible, of the inſtrument or document, called in Mr. MARSDEN's notes a Warrant, ſhould be procured, in order that they might have a more accurate conſideration

* See Appendix, No. III. † Ibid. IV.

conſideration of the caſe. For this purpoſe an application was made to the Lord Lieutenant, which, for very obvious reaſons, it was deemed prudent ſhould be made through the Chief Secretary of State. Accordingly, on the 17th of December, the following note was written to Sir EVAN NEPEAN *.

On the 21ſt of December, Sir EVAN NEPEAN ſent the following anſwer †.

This anſwer was laid before Counſel, who, upon the latter part of the note, were of opinion, either that no ſuch inſtrument as that called a Warrant had ever been in exiſtence, and that Mr. MARSDEN had made uſe of ſuch an intimation merely to induce Mr. Juſtice JOHNSON to give bail, or that, if any ſuch inſtrument had been really tranſmitted, that Adminiſtration had been wiſely adviſed not to make uſe of it, and had conſequently determined to ſuppreſs it. No conception was entertained that any attempt had, or could have been made, "to palter in a double ſenſe."

All idea, Mr. Juſtice JOHNSON ſaid, was from this time given up by him, and by his Counſel, that any attempt would be made to carry any ſuch Warrant into execution in Ireland ‡; and accordingly he gave neither himſelf nor his Counſel any further trouble about the matter.

About the 15th or 16th of January following, however, he ſaid he received an intimation, (which had been tranſmitted by Mr. MARSDEN to a friend of Mr. Juſtice JOHNSON's) that if he did not ſign a paper, not only equivalent to giving bail, but alſo undertaking to plead and go to trial in England, in the Term following, (which began in a week) an arreſt of his perſon muſt take place ‖.

To this he anſwered, that his Counſel had gone out of town during the vacation; that they were not returned, but being daily expected, the letter of Mr. WHITE ſhould, at the earlieſt opportunity, be laid before them, and an anſwer in conformity to their opinion ſhould be immediately returned. On the 17th, however, at a late hour in the evening,

* See Appendix, No. V. † Ibid. VI. ‡ Ibid. VII. ‖ Ibid. IX. X.

evening, two Peace Officers made their appearance at Mr. Juſtice JOHNSON's houſe, who being admitted, ſaid they came to require Mr. JOHNSON immediately to ſign a paper, which they produced, or otherwiſe that their orders were to arreſt him. They ſaid, they came from the Attorney General. Mr. Juſtice JOHNSON conceiving that the anſwer which he had ſent the day before had not been laid before the Attorney General, reduced it to writing, and requeſted of the Officers, that they would lay it before the Attorney General. They accordingly went away to do ſo, Mr. Juſtice JOHNSON engaging to remain where he was until their return. The next morning they returned, with peremptory orders to execute the Warrant, if the condition before mentioned ſhould not be inſtantly complied with. Mr. Juſtice JOHNSON ſaid, that finding the paper was to bind him to appear in Weſtminſter Hall, and to go to trial in ſo ſhort a ſpace of time, that any attempt to prepare or defend himſelf would be in vain, and that he had been by the letter of Sir EVAN NEPEAN, lulled into a deceitful ſecurity, he declined (an opportunity even of adviſing with his Counſel, being refuſed to him) to ſign the paper. Accordingly, the arreſt was completed. A copy of the Warrant was then demanded by Mr. Juſtice JOHNSON's Attorney, for the purpoſe of ſuing out a Writ of Habeas Corpus. The copy was at firſt refuſed, but afterwards granted, and Mr. EMERSON, the Attorney, having taken it, was diſpatched for the Writ. The Officers were then aſked what were their further orders? They anſwered, that they muſt bring Mr. Juſtice JOHNSON to Dublin; [his houſe is about two miles diſtance from Dublin;] but, that there he might remain at any houſe he thought proper. They were aſked, if they had any objection to his remaining at the houſe of Mr. WILLIAM JOHNSON, in Harcourt-ſtreet? They aſſented directly. Accordingly, Mr. Juſtice JOHNSON ſaid, he drove thither followed by the Officers. On his arrival there, it occurred to Mr. SCRIVEN, who had accompanied him, that the Attorney General could not have any reaſonable objection to Mr. Juſtice JOHNSON returning to his own houſe for the night, as the Writ would be immediately obtained, (the Chief Juſtice then, in conſequence of a previous intimation having been ſent, remaining at home for the purpoſe of allowing it,) and that he would himſelf go and aſk the Attorney General.

One

One of the Officers said, that as the Attorney General was waiting for him to know the event, he must go, and that he would himself mention the request to the Attorney General, who, he made no doubt, would comply. The Officer went, and did not return with an answer until the day was nearly elapsed. He then informed Mr. Justice JOHNSON, that as to his returning to his own house, for that night, the Attorney General would not interfere*; and therefore he, the Officer, could not permit it. Mr. Justice JOHNSON said, he replied, he was sorry for it, but would endeavour to accommodate himself for the night, where he was. The officer, after a little pause, observed, he was sorry he could not permit even that, as his orders were that Mr. Justice JOHNSON *must sail forthwith for England*—and then turned to the Constable who was to accompany his prisoner in the voyage, and gave him some directions. Thus, Mr. Justice JOHNSON said, that after an illness which had confined him nearly four months, suffering under an almost total deprivation of the use of his limbs on one side, and requiring constant assistance; he had been, under a pretence of being taken no further than Dublin, led away from his own house, without having given the slightest intimation to his family of the cause of his departure—without having left any provision for the support of his house during his absence—without having prepared any money for his own expenses—and he was even without being permitted to return, or to remain a sufficient time to procure a change of clothing, or friend to accompany him, or a servant to attend him, in this helpless situation, to be shipped on board in most severe and tempestuous weather, and accompanied by a Constable, on his landing on the other side, to be sent from Magistrate to Magistrate, by "the most direct road," to London; and this attempt was made at the moment when his Attorney was actually employed at the proper office, preparing a Writ

* It is a debt due to candour to state the answer which was given by Mr. Attorney General to this complaint of severity made by Judge JOHNSON. 'Mr. Attorney said, that as the act under which the arrest was made, enacted, that the prisoner should be carried "by the most direct way,"; he considered, that any delay in the transmission (even for one night, and in the prisoner's own house, and at his own earnest desire) would enable him to maintain an action for *false imprisonment*; and, therefore, the desire of Judge JOHNSON was not complied with.

Writ of Habeas Corpus, and the Chief Juſtice remaining at home, by appointment, to allow it.

In this difficulty, he ſaid, he ſent privately to his coachman directions to bring the carriage to the door, and that he ſhould, as ſoon as his maſter got in, without waiting for further orders, drive directly to the Lord Chief Juſtice. He then applied to the conſtable, and told him it was neceſſary, before they went on board, to call at a houſe in town, in order to leave ſome directions, and aſked the conſtable to accompany him in the carriage. The conſtable having aſſented, they got into the carriage, and were immediately driven, without the privity of the conſtable, to the houſe of the Lord Chief Juſtice, where Mr. Juſtice JOHNSON immediately got out, and threw himſelf upon his Lordſhip's protection, who accordingly kept him, until the writ of Habeas Corpus was procured, ſealed, and allowed.

Theſe circumſtances, which Mr. Juſtice JOHNSON ſaid were not concluded until a late hour yeſterday evening, together with the deceitful ſecurity into which he had, by Sir EVAN NEPEAN's letter, been lulled, would, he hoped, account ſufficiently for his Counſel being unprepared for an immediate argument.

The Judges having permitted him to ſtate ſo far, he ſaid, he hoped they would indulge him for a few minutes, in ſtating publicly his reaſons for his reſiſtance, and for declining to meet at once the trial which was offered to him.

Mr. Juſtice JOHNSON then read the following reaſons:

Becauſe every contrivance has been made uſe of to obtain a trial in *form*, and to exclude a trial of the *merits*.

The proceeding by information is avoided, and that of indictment choſen, becauſe a rule for an information could not be obtained without an affidavit of the falſehood of the charges publiſhed, which the proſecutors would not do, becauſe they could not do ſo with ſafety.

The

The particular place is chosen, and the trial transferred to it, because an acquittal there, will in a pecuniary view, be a more severe punishment, from the enormous expence, (if witnesses could be had at any expence) of defending, than any fine would probably amount to, even if the indictment were submitted to.

Because no expence whatsoever can give the defendant any certainty of having any witness to attend, inasmuch as the prosecutor has purposely chosen a place for trial where the defendant cannot have compulsory process for the attendance of any witness, although a law has been passed for the purpose of bringing him thither.

Because the present is a case, of all others, where such a circumstance will produce the highest degree of oppression; inasmuch as the charge is attempted to be supported on evidence of similitude of hand-writing, of papers in the possession of the prosecutor himself, and of which the defendant can have no knowledge until the moment of trial, in a place beyond sea, and where there is perhaps not one person resident acquainted with his hand-writing; and even if he had, in such a case, a trial where his hand-writing was known, as such evidence is matter of belief and conjecture merely, his method must be, to summon as many persons into Court as he could get to attend, who were acquainted with his hand-writing, in order, upon the view at the time, to be enabled to have those who could form a belief or opinion upon the fact—it being notorious, that there are many people who have seen a hand-writing, yet, upon a particular writing, which they had not seen before being produced, have not been able to form such a belief as the law requires.

Because it is notorious that the prosecutors have procured witnesses, (most probably at the public expence, and without compulsory process) to go from Dublin (all residents there) to London, to give evidence there; and that the fact, as against the defendant, must be testified by them.

Becauſe it is notorious, that all the above is *contrivance* to elude a fair trial, and not *neceſſary* to the attainment of juſtice; inaſmuch as it is notorious, that the publication, (which is the only fact ariſing in London) aroſe as much in *Dublin*—the paper having been ſold, and being daily now ſelling in the ſhops in *Dublin*; which fact is as much a publication as the publication in London, and could equally be given in evidence on a trial againſt the ſuppoſed writer.

Becauſe, by a trial in London, if the defendant ſhould be convicted, he would be deprived of the full benefit of giving the truth of the facts, and other circumſtances, in evidence, in mitigation of his ſentence—the Court, in ſuch laſt-mentioned caſe, determining, as a Jury, upon the credit they give to the witneſſes, from knowledge of their character, and from knowledge of the defendant's himſelf, and from their own knowledge of facts, which they may happen to have.

Becauſe, even if the caſe were *doubtful*, the liberty of the ſubject ſhould be preſerved:—though the defendant does not apprehend it to be doubtful; becauſe, in order to remand the defendant, the Court muſt determine, that in a caſe againſt a ſuppoſed writer of a libel, when he was, at the time of the alledged writing and publication in Dublin, and not elſewhere, and when the papers appeared to have been written in Dublin, and where the witneſſes to prove the writing on the one ſide, and to diſprove it on the other, are all reſidents in Dublin, and where the publication was in Dublin, (as well as in London and elſewhere) and where all the facts happened previous to the paſſing of the act, the Legiſlature had it in their contemplation, that ſuch a caſe ſhould be ſent for trial to London, a place nearly 400 miles diſtance from Dublin, beyond the ſeas, beyond the juriſdiction of the code of laws within which the above facts happened, and to a place where no proceſs can compel the attendance of a ſingle witneſs reſident in Dublin aforeſaid; an intention ſo monſtrous, that it never can be enforced, while the act, by any poſſibility, can admit of any other conſtruction.

The

The argument then commenced by the Council for Mr. Juſtice JOHNSON.—The ATTORNEY GENERAL replied on Tueſday the 22d.

A difference of opinion ſubſiſting among the Judges,* the matter was adjourned into the Court of King's Bench.

There it was again argued. The Court were again divided; but a majority, (one of the Judges being abſent) being of opinion, that Mr. Juſtice JOHNSON ſhould be remanded, a new writ of Habeas Corpus was ſued out, returnable into the Court of Exchequer.

There the queſtion was argued for three days, before a full Court; a majority of whom agreed with the Court of King's Bench—but the Barons having, in conſequence of a diverſity of opinion, delivered their ſentiments *ſeriatim*, and at conſiderable length—and the Bar having diſplayed extraordinary ability in the diſcuſſion before them, it has been thought fit to ſelect the proceedings of the Court of Exchequer, as preſenting at once the fulleſt view of this important ſubject.

* It was reported that the diviſion was as follows: there were eight Judges aſſembled:—Three were of opinion that Mr. Juſtice JOHNSON ſhould be remanded; three that he ſhould be diſcharged; two declined to give any opinion.

COURT OF EXCHEQUER,

The 4th Day of February, 1805.

Present:

The Right Hon. the Lord CHIEF BARON,
The Honorable Baron GEORGE,
The Honorable Baron SMITH,
The Honorable Baron M'CLELLAND.

THE Writ of Habeas Corpus, and the Return thereto, and the Affidavits † of the Hon. Juſtice JOHNSON and JOHN SWIFT EMERSON, Gent. being read,

Mr. BURROWES

Stated the facts diſcloſed by the Return and Affidavits. He ſaid, to juſtify this arreſt, and to warrant your Lordſhips to remand, an Act of Parliament of the laſt Seſſion is reſorted to. If that Act of Parliament muſt be ſo conſtrued, abſtract as ſuch conſtruction muſt be from the principles of our Laws and Conſtitution, the Legiſlature muſt be obeyed; and we cannot be ſuffered to take refuge in judicial miſconſtruction from the mandates of the ſupreme power of the State.

Whether the Legiſlature has ſo clearly and unequivocally expreſſed its will as to preclude all judicial interpretation in favour of pre-exiſting rights of the moſt ſacred kind, is now to be argued and decided. What is the propoſition which

† See Appendix XI. XII.

which, in order to juſtify this arreſt, it is admitted muſt be received as the perpetual Law of thoſe Realms, enacted by this Statute? I ſay perpetual; becauſe, as the Act is not limited in duration, this Court never can make the poſſible correction of it in future any ground of their conſtruction; and you muſt decide whether the legiſlature intended that its ſubjects ſhould exiſt for ever under ſuch a rule. The propoſition contended for is, "That wherever *any* man "of *any* rank, however low, ſhall obtain a Warrant from "*any* Magiſtrate for *any* miſdemeanor, however petty, "againſt *any* man, however high, he may cauſe him to be "arreſted in *any* extremity of the United Kingdoms, and "to be tranſmitted at the public expenſe, *without a right* "*of being bailed*, to the kingdom where the offence is "charged to be committed; even though ſuch perſon "never had been for one moment in the kingdom to which "he is tranſmitted." Such a propoſition ſtartles every man who hears it. The peculiar hardſhip of my client's caſe is merged in the public miſchief; and I will not weaken his claim to a conſtitutional interpretation of this act, by dwelling upon his peculiar ſituation. It is equally his wiſh and his intereſt, that this act ſhould be diſcuſſed upon general grounds; and in reſpect of him perſonally I ſhall only ſay, that in rejecting the Attorney General's offer to waive the operation of the law in reſpect of him, and accept of bail, he acted as became the ſubject of a free ſtate; and if he had compromiſed this queſtion, and ſubmitted to violent and unconſtitutional interpretation of this law, in return for perſonal indulgence, he would have diſgraced his character as a Judge, and ought to be ſtigmatiſed.

In arguing this queſtion, I will *in limine* admit that the obvious and primary (I do not ſay neceſſary) meaning of the enacting words eſtabliſhes ſuch a rule. The enacting words are ſufficiently comprehenſive to include my client's caſe, and every caſe which I have ſtated; and unleſs there be paſſages in the act which, according to the rules of judicial conſtruction may explain and limit the extent of theſe words, my client muſt be remanded. I admit, alſo, that the enacting words of a law are not neceſſarily reſtrained by the title or preamble; but that, on the contrary, the enacting words may extend to many caſes not mentioned in either title or preamble; and that judicial interpretation in

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purſuit of the manifeſt intent of the Legiſlature, may extend a law to caſes not ſtrictly or literally within title, preamble, or enacting words. I am ſo far from denying this, that I conceive that the principal ſtrength of my client's caſe depends upon its admiſſion; becauſe, I mean to argue, that from the whole of the act, accurately examined and collated, you never can ſay that it was the will of the Legiſlature that ſuch a rule ſhould be eſtabliſhed; and it is not my intereſt, nor am I warranted, to fetter judicial interpretation within narrow and irrational limits.

Upon two grounds I contend that the act does not embrace this caſe:—Firſt, I ſay, "That as to the tranſmiſſion "of perſons from kingdom to kingdom, it ought to be "limited to perſons charged with offences not bailable:"—Secondly, "That it only extends to perſons who having "committed an offence in any place where they were perſonally preſent, have ceaſed in any way to continue within "the juriſdiction where the offence was actually committed."—Mr. Juſtice JOHNSON is only accuſed of a miſdemeanor which is bailable; and I have a right to aſſume, (it being diſcloſed by affidavit, and not contradicting the return,) that he was in the kingdom of Ireland when the alleged libel was publiſhed, by his procurement, in England, and ever ſince; conſequently, if I eſtabliſh either ground, he muſt be diſcharged.

In conſtruing this act, I am not aſhamed to refer you to an elementary book; and to a part of that book at which a diligent ſtudent might arrive in the firſt day of his legal ſtudies. The rules or ſigns, as he terms it, by which the will of the Legiſlature may be beſt explained in Acts of Parliament, are no where laid down with more judgment and clearneſs than in 1ſt Black. Com. page 59. Theſe ſigns, according to that elegant and luminous writer, are, 1ſt, The Words—2d, The Context—3d, The Subject Matter—4th, The Effects, or Conſequences—5th, The Spirit and Reaſon of the Law.——I have already admitted that the firſt impreſſion of the mere enacting words would make againſt my argument; but if I ſucceed in proving that upon the whole four latter grounds of interpretation, they are ſtruggling on the other ſide againſt the will of the Legiſlature,

lature, as well as againſt the liberty of the ſubject, you will no doubt diſcharge him.

Apply theſe principles to my firſt objection—the Legiſlature manifeſtly makes a diſtinction between the objects of the acts in the arreſt and tranſmiſſion of offenders from kingdom to kingdom, and from county to county within the ſame kingdom.

If no diſtinction was intended, the whole object of the Legiſlature would be accompliſhed by the firſt ſection, by merely ſubſtituting the words *United Kingdom* for *Ireland* whenever the latter Term occurs; and the third and fourth ſection would not only be ſuperfluous, but the Law would be uniform and free from the objections to which it is admitted by the other ſide to be liable, and which it is ſaid *will be* remedied by the Legiſlature.

Upon the other ſide it is admitted that a diſtinction is made—What is the diſtinction according to their interpretation, and what according to ours; and let me aſk you, in the firſt place, which is moſt probable to have been the intention of the Legiſlature?—They ſay that as between kingdom and kingdom every claſs of offenders is included as well as between county and county of the ſame kingdom; but that perſons arreſted in one kingdom for bailable offences committed in another cannot be bailed, though as between county and county they may.

We ſay that as between kingdom and kingdom the law only acts upon offences not bailable, that therefore the objects of the law cannot be bailed.—Their diſtinction repeals the Habeas Corpus Acts of both countries; ours conforms to them; their diſtinction reſpects their right of being bailed when its violation would be comparatively unoppreſſive, and annihilates it when it is moſt neceſſary. According to theſe diſtinctions we muſt ſuppoſe that the Legiſlature when in the firſt ſection they are providing for the arreſt of a perſon accuſed of a miſdeamenor in an adjoining county are ſo tender of liberty as to provide that he ſhall be bailable upon the very ſpot where he is arreſted; but that in the third and fourth ſections they loſe ſight of every pre-exiſting right and valuable perſo-

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nal privilege, and empower the tranſmiſſion of the ſame claſs of offenders from kingdom to kingdom, without a right of being bailed; and that they have diſtinguiſhed the caſes for the ſole purpoſe of making this prepoſterous and inverted diſtinction. If it be ſaid that the law would be imperfect if it did not act upon inferior offenders as well between kingdom and kingdom as between county and county, I anſwer, that it is a vain hope to frame any law which will not be in ſome particular defective; and that to exclude all inferior offences would upon the whole be more practically wiſe than to include them all—inaſmuch as the ſafety and peace of each diſtinct kingdom might be conſidered as ſufficiently provided for by the purſuit and bringing back to puniſhment of daring and dangerous criminals, while the flight and baniſhment of inferior offenders, who would ſtill be puniſhed if they ſhould ever come within the juriſdication, might be deemed ſufficient.—I ſhall now proceed to ſhew how the context of this act bears upon and eſtabliſhes my diſtinction; but I ſhall firſt ſtate how the law *before* this act ſtood in relation to the arreſt and tranſmiſſion of offenders from kingdom to kingdom; *firſt*, no man could be legally arreſted for any miſdemeanor committed in another kingdom, conſequently he could not be legally tranſmitted. The caſe was *entirely unprovided for*, and perhaps in wiſdom ſhould for *ever* remain ſo. In reſpect of felons and traitors, the practice, and perhaps the law was different. There exiſted a practice founded upon the antient prerogative of the Crown of arreſting high offenders accuſed of offences not bailable, and tranſmitting them for trial from kingdom to kingdom, and this uſage was recogniſed and ſanctioned by the Habeas Corpus Act in England. The arreſt was always under a Secretary of State's warrant, and the Priſoner was tranſmitted by a King's Meſſenger. No ordinary Magiſtrate ever did, or could grant ſuch a warrant. It was a mere ſtate proceeding, optional on the part of the Crown, and the authority was local and limited. That in reſpect of the arreſt and tranſmiſſion of higher offenders there was ſome, but an inſufficient remedy; in reſpect of inferior offenders none.

The pre-exiſting law being as I have ſtated, ſtrongly illuſtrates the inference I derive from the preamble and context

context of the act; and the object, ſpirit, and policy of the act, and the conſequences of the different interpretations in my opinion remove all doubt upon the ſubject.

The preamble of the firſt ſection, which eſtabliſhes the law as between county and county, recites, "Whereas it frequently happens that *perſons againſt whom Warrants are granted* by, &c. &c. eſcape into other counties, &c. &c." Nothing can be more comprehenſive than the deſcription of the objects of this act mentioned here and in every part of this ſection. There is not a ſyllable to reſtrain their generality. The deſcription both in the preamble and enacting part is preciſely the ſame. The context conſpires with the enacting words, and the ſpirit and reaſon of the law are anſwered by a literal and comprehenſive conſtruction—no bad effects can follow from it—no grand conſtitutional law is indirectly repealed—no vital principle of perſonal liberty is ſacrificed.—The letter, context, object, ſpirit and policy of the law are the ſame; and the Legiſlature having unqueſtionably intended to extend its proviſions to miſdemeanors, have provided that the liberty of the ſubject ſhould not be ſacrificed, and they have enacted a right of being bailed in bailable offences, commenſurate to the new power of arreſt which they have introduced.

Look now to the preamble, and examine the context of ſections 3 and 4, which provide for caſes between kingdom and kingdom. How are the objects of theſe ſections deſcribed? "And whereas it frequently happens that felons and other malefactors in that part of the United Kingdom, called Ireland, make their eſcape into that part of the United Kingdom, called Great Britain." Is it a violation of our language to ſay that theſe words import the higher and more enormous offenders? If it be ſaid, that the term *malefactors* may be uſed to deſignate any offenders, is it no anſwer to ſtate that that term is generally uſed to denote the higher offenders; that felons, and *other malefactors*, according to the rules of conſtruction mean malefactors of a like kind; and that if *malefactors* be interpreted as comprehending all offenders, the word *felons* may be rejected as ſurpluſage? But examine the context further, in order to diſcover who are the objects of this part of the act?

" Whereby theſe offences often remain unpuniſhed, there being no *ſufficient* proviſion by the laws now in force for apprehending *ſuch offenders*, and tranſmitting them, &c. &c."—Is it not manifeſt from theſe words, that the offenders within the contemplation of the Legiſlature are felons and other malefactors, in reſpect of whom there pre-exiſted *ſome*, but *an imperfect proviſion* by law, as to arreſt and tranſmiſſion? In reſpect of inferior offenders, there pre-exiſted no proviſion at all. In reſpect of the higher order of criminals, there pre-exiſted an imperfect and inſufficient proviſion. Does it not follow that the Legiſlature moſt clearly meant to extend the proviſion of theſe diſtinct ſections to the latter deſcription of offenders, and not to the former?

But it is ſaid the enacting words are univerſal, and not to be reſtrained by the preamble. I admit they are not neceſſarily to be reſtrained; but I contend, that when the context, the ſubject matter of the law, the effects and conſequences of the different conſtructions, and the ſpirit and reaſon of the law, all (as in this caſe) conſpire to limit the generality of the enacting words, all thoſe latter guides conjointly ought to govern. The enacting words certainly are very general: " If any perſon or perſons againſt whom a warrant ſhall be iſſued, &c. &c. for any crime or offence againſt the laws in force in Ireland, &c. &c." If this deſcription in the enacting part ſtood alone and unexplained by other words and by the context, a word could not be ſaid in ſupport of my conſtruction; but I contend that it is not unreaſonable or unprecedented, in purſuit of the intention of the Legiſlature, to conſtrue " any perſon" to mean " any ſuch perſon as was before deſcribed; and the words " for any crime or offence againſt the laws," to mean " any ſuch crime or offence as was before deſcribed."—By the Whiteboy act, a number of offences are made capital by words totally unlimited, and by diſtinct ſections. Innumerable inſtances have occurred of caſes which have fallen manifeſtly within the enacting words; yet the Judges have looked at the title, the preamble, and the recitals of that act for its object, and have never conſidered any caſe within it, unleſs proof was previouſly made that the particular county, where the queſtion aroſe, was in that rebellious, riotous ſtate, which gave riſe to the

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ſevere proviſions. Upon a ſimilar principle was Ranwick Williams's caſe decided, by which a monſtrous offender, clearly within the letter of the law was acquitted, becauſe his caſe did not fall within the evil intended to be remedied by the law under which he was tried.

It has been argued, that by the 13th Geo. III. in the Britiſh Parliament a ſimilar law was enacted, as between England and Scotland, with almoſt the ſame recitals and enacting words, and that that act extends to all miſdemeanors, although no proviſion is made for bail. I ſay, that if theſe two acts be collated, important differences will be found between them. But it is unneceſſary to waſte time in this enquiry, becauſe the whole gift of the obſervation is aſſumed without any proof. No ſingle caſe has been adduced by which the 13th of Geo. III. has been conſtrued to extend to miſdemeanors; and, I ſay, that it is more probable that ſuch an extenſion of that law was never attempted, than that it was conſtantly and univerſally acquieſced in. Can it be credited, that where a Judge of the land has conſtrued this law not to extend to miſdemeanors, and where there is at leaſt ſo much doubt upon the ſubject, that no Engliſhman or Scotchman, jealous of his rights, and ſtruggling for his liberty, would have taken the opinion of a Court of Juſtice upon the ſubject? Such a ſuppoſition is unnatural in the extreme; and we ought rather to preſume, that no Engliſhman or Scotchman was ever tranſmitted out of their reſpective kingdoms for a miſdemeanor under this act.

It appears by this return, that the Court of King's Bench have conſtrued this act againſt my argument. It cannot be contended upon the other ſide, that this determination is binding upon you; and I will not deny that it is a formidable precedent. It is, however, but the determination of a divided Court, from which alſo one Judge was abſent: and, in a new caſe like this, when the moſt valuable rights of the ſubjects of the whole empire are involved, I ſhould hope that you will attend more to the argument than the authority. I have an high reſpect for that Court: for the amiable and dignified perſon who preſides in it I feel more than reſpect. I met him with an early and inſtantaneous predilection, which has ripened

into habitual and almoſt involuntary eſteem and veneration. I could not if I would, I would not if I could, detract from the weight of his authority by diſparaging reflections. I ſhall not wound his feelings by praiſe, or the feelings of others by cenſure. I ſhall only ſay, (what the occaſion extorts) that if I were to look for any imperfection in his character, I muſt ſearch for it in the exceſs of ſome noble and virtuous propenſity, ſome amiable or admirable quality of the head or the heart. I would ſay that he has, perhaps, too much of a quality of which moſt other men have too little: you perceive I mean that intellectual humility, that modeſty of mind, without which wiſdom cannot exiſt, and even genius loſes much of its luſtre. To the predominance of this quality, I would, perhaps, aſcribe this judgment; and I would add, that, upon ſuch a ſubject as this, he would be more liable to err than upon any other. When the conſtruction called for might appear to be an extenſion of juriſdiction, an interference with the functions of the Legiſlature, a ſort of conſtructive legiſlation, I ſhould fear that the modeſty of his nature might, perhaps, too much controul the ſuggeſtions of his powerful and comprehenſive underſtanding. But, certain I am, that if you ſhall differ from him, he will rejoice that the liberty of the ſubject has ſurvived this act, and will feel more gratified than rebuked.

Upon the 2d objection, namely, "that this act only applies to perſons who, by change of place in any way occurring, have ceaſed to continue in the juriſdiction where the offence was committed," the caſe of my client is ſtill ſtronger, becauſe his caſe does not fall within the neceſſary and obvious meaning of the enacting words, and the context, object, ſpirit, and meaning of the Legiſlature; and the conſequences of the conſtruction contended for on the other ſide are ſtill more powerful in excluding his caſe under this head of objection than under the former.

It has been I think incorrectly ſaid, though by high authority, that the object of this act being to prevent impunity in general, the recital of one mode by which impunity is obtained, ought not, in any degree, to controul the extenſion of the remedy to other modes by which juſtice may be eluded. Moſt manifeſtly the act has no ſuch

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comprehenſive object, as to correct any abuſe by which impunity of crimes might be procured. Many modes of eluding juſtice may exiſt, and are in daily practice, to which the Legiſlature had not the ſlighteſt notion of applying its proviſions. Every line of this act ſhews that the ſole object of the law, and of thoſe laws which it nearly copies, was to prevent the evaſion of juſtice by a removal out of the juriſdiction.

The 23d Geo. II. c. 56. ſ. 11. in Great Britain was the firſt act upon the ſubject. The preamble and enacting words of this ſection are confined to perſons eſcaping out of the juriſdiction *after a warrant iſſued to apprehend*, and no proviſion is made for bail in bailable offences. It was obvious that the act ſhould have comprehended perſons eſcaping out of the juriſdiction before the iſſuing of the warrant, and reſiding or being elſewhere. Accordingly, the 24th Geo. II. ch. 55, after reciting this ſection, proceeds, "and whereas ſuch offenders may reſide or be in ſome other county, &c." out of the juriſdiction of the Juſtice granting ſuch warrant as aforeſaid, before the granting ſuch warrant, and without eſcaping or going out of the county, &c. *after ſuch warrant granted.*" Now it is plain, that the words *without eſcaping after ſuch warrant granted*, import that the perſons in contemplation have eſcaped before warrant granted. Such conſtruction is agreeable to the ordinary rules of interpreting language, and is forced upon us by the obvious defect of the former act, and the nature of the ſubject. Now ſee whether the enacting words may not without violence be conſtrued to extend merely to perſons, who having ceaſed to continue within the juriſdiction where they have violated the laws and ought to be tried, are fit objects of legal purſuit, "be it *therefore* enacted, that from and after, &c. &c. in caſe any perſon againſt whom a warrant ſhall be iſſued by any Juſtice, &c. of any county, &c. ſhall eſcape, go into, reſide, or be in any other county, &c. out of the juriſdiction of the Juſtice granting ſuch warrant, it ſhall and may be lawful for any Juſtice of the county, &c. where ſuch perſon ſhall eſcape, go into, reſide, or be, to indorſe his name, &c. &c." Now I conceive it to be a natural and reaſonable conſtruction of theſe words, in an act made manifeſtly for the purſuit of fugitive offenders, to interpret the words "ſhall

"shall reside or be," to mean "shall become resident or existing." The contrary interpretation renders the words *shall escape or go into*, totally superfluous and unmeaning; for if the words *reside or be*, apply to all cases and all modes of residence or existence, as is contended for, such words would manifestly include the cases of residing or being after escaping or going into the places to which the process is extended. Such an interpretation also would render the law *ex-post facto*, when it is expressly framed to commence from a certain date, and must be considered as prospective. The date of the act cannot refer to the issuing of the warrant, but to the act of the object of the law bringing himself within its operation. The objection that a law is *ex-post facto*, never can be answered by rendering its force dependent upon the act of a third person, subsequent to the passing of a law. I conceive that the words *reside or be* are introduced, in order to extend the effect of the law to all cases in which an offender is found out of the jurisdiction in which he personally violated the law, without distinguishing how, why, or under what circumstances he ceased to continue where he had offended. It might be deemed reasonable and just to bring an offender back to trial, whatever might be the cause or occasion of his removal out of the jurisdiction, although it would be repugnant to the principles of justice to force him into a jurisdiction within which he never had been.

Such are the two English acts introduced to regulate this subject between county and county in England; and it has been urged by the Attorney General in another place, that the first section of the act we are construing is founded upon these acts, that the preamble of the present act contains in substance the same recitals, and that the enacting words are identically the same. The preamble of the first section of the present act recites, "whereas it frequently happens that persons against whom warrants are granted, &c. escape into other counties, &c. and it may also happen that persons having committed offences in some county or place, may reside or be in some other county or place, out of the jurisdiction, &c. whereby, &c." The same recital comprehends the objects of the 23d Geo. II. namely, persons escaping after a warrant, and the latter recital extends to persons ceasing to continue within the jurisdiction after

after the offence committed, whether they had left it before or after the warrant was iſſued. The words *having committed* in the ſecond recital manifeſtly mean *after having committed*, and the words *may reſide or be*, muſt mean *may become reſident or exiſting*; and there is not a ſingle ſentence or word in any of the acts to ſhew that the Legiſlature had in contemplation the caſe of a man reſiding, or being out of the juriſdiction, at the time the offence was committed within it.

If ſuch interpretation be admiſſible as to the law which provides as between county and county, with what additional force does it apply to caſes ariſing between kingdom and kingdom. The recital in the ſections providing for the latter caſes, is confined to *felons and other malefactors eſcaping from one kingdom to another*, and the enacting words are preciſely the ſame.

I have argued from the words, let me now argue from the ſilence of the Legiſlature. If the law was intended to extend to conſtructive miſdemeanors between kingdom and kingdom, would it not have made a proviſion for bail? Would it not have armed the priſoner with proceſs to compel witneſſes from the place where he was when the fact was committed, and where his defence would moſt probably ariſe, to attend his trial? Would it not have provided for the trial of acceſſaries in Ireland to felonies committed in England? As the law ſtood before this act, and ſtill ſtands, an acceſſary in Ireland to a murder or felony in England could not be tried in either country. This act creates no new offence. It does not extend the juriſdiction of any Court. It merely facilitates proceſs in bringing offenders who were before ſubject to trial before a tribunal which before had cognizance of their offence. It follows clearly that an acceſſary reſident in Ireland to a murder or felony committed in England cannor be arreſted and tranſmitted under this act. To what end tranſmit him? If he cannot be tried, he muſt be diſcharged. You never could conſtrue an act expreſsly made to facilitate the arreſt and trial of offenders to extend to perſons who cannot be tried. Such perſons however criminal *in foro conſcientiæ* are, technically ſpeaking, guilty of no municipal offence. They are in the ſituation of acceſſaries in one county to felonies committed

committed in another before the II. and III. Edw. Engliſh, and the 10th Ch. I. Iriſh. They are objects of total impunity—what follows? That if Mr. Juſtice JOHNSON had procured a murder or felony to be committed in England while he reſided here you muſt diſcharge him without bail; but according to the argument upon the other ſide, upon account of the ſlightneſs of his offence, you muſt tranſmit him without bail. It would be an inſult to the Legiſlature to impute to it ſo impolitic and prepoſterous a diſtinction, and in refuſing to eſtabliſh it you vindicate their character, inſtead of uſurping their power. Can you believe from any part of the act, or from all its parts collated and compared, that the Legiſlature intended that *no acceſſary* to a murder or felony, however atrocious the guilt, ſhould fall within its proviſion, but that *every man* who ſhould procure a miſdemeanor, however venial, to be committed, ſhould be ſubject to its ſevereſt proviſions? That the former claſs of offenders ſhould triumph in total impunity, and the latter languiſh under the bittereſt perſecution?

Upon the whole of this caſe, I conceive that Mr. Juſtice JOHNSON is entitled to be diſcharged: becauſe he is a ſubject of a free ſtate entitled to perſonal liberty, which he has not forfeited by any crime committed againſt the law of the country in which he lives: becauſe the law of the Imperial Parliament, whoſe ſupremacy he was himſelf ſo forward in eſtabliſhing, under which he is treated as a priſoner not bailable for a conſtructive miſdemeanor, is in reſpect of him *ex-poſt facto*: becauſe felons and criminals eſcaping juſtice by flight or removal from the juriſdiction which ſhould try them, appear from the title, preambles and whole ſpirit of the act to be the ſole object of the Legiſlature: becauſe the Habeas Corpus acts of both countries would by a contrary conſtruction ſtand perpetually repealed: becauſe to ſupport the arreſt you muſt believe that the Legiſlature in one and the ſame act provided for perſonal liberty where its violation would be comparatively uninjurious, but left it totally unprotected where the moſt oppreſſive conſequences would follow its invaſion. That they intended to leave acceſſaries to felonies and murders in total impunity, and to purſue inferior offences which the law does not treat as acceſſorial, merely from their ſlightneſs, with the bittereſt vengeance. That in purſuit of juſtice they ſhould

ſhould for the ſlighteſt offence tranſmit a man as a felon to a foreign country without furniſhing him with proceſs to command the attendance of witneſſes, and that in a caſe where the juriſdiction at home is full as competent and much more fit to try the offence. Until this queſtion is finally ſettled by judicial determinations, I never can credit that the Imperial Parliament intended to leave the ſubjects of the united countries under a rule ſo unequal, ſo miſchievous, and ſo abſurd. It might perhaps be credited, that in violent times, under the predominance of an arbitrary ſpirit, a Miniſter might preſs forward a law which would leave the liberty of the ſubject at the mercy of the Crown. But I cannot credit, that any Miniſter, in any Parliament, would empower any man to violate the liberty of every other whom he might diſlike, under the ſlighteſt pretext—would defray the expenſes of his malicious proſecution, and ſubject a man, becauſe he was charged with the ſlighteſt offence, to inevitable puniſhment, more heavy than could be inflicted in conſequence of his confeſſion or conviction of an offence of tenfold enormity. I therefore conceive that there is nothing in this act to warrant the detention of Mr. Juſtice JOHNSON, and feel a confident hope that he will be diſcharged.

Mr. CURRAN.

My Lords,

It has fallen to my lot, either fortunately or unfortunately, as the event may be, to riſe as counſel for my client on this moſt important and momentous occaſion. I appear before you, my Lords, in conſequence of a writ iſſued by his *Majeſty*, commanding that cauſe be ſhewn to this his *Court* why his *ſubject* has been deprived of his *liberty*, and upon the cauſe ſhewn in obedience to this writ, it is my duty to addreſs you on the moſt awful queſtion, if awfulneſs is to be judged by conſequences and events, on which you have been *ever* called upon to decide. Sorry am I that the taſk has not been confided to more adequate powers; but, feeble as they are, they will at leaſt not ſhrink from it. I move you therefore that Mr. Juſtice JOHNSON be releaſed from illegal impriſonment.

I cannot but obſerve the ſort of ſcenic preparation with which this ſad drama is ſought to be brought forward. In

part I approve it: In part it excites my *diſguſt* and *indignation*. I am glad to find that the Attorney and Solicitor General, the natural and oceſſial proſecutors for the State do not appear; and I infer from their abſence, that his Excellency the Lord Lieutenant diſclaims any perſonal concern in this execrable tranſaction. I think it does him much honour; it is a conduct that equally agrees with the dignity of his character and the feelings of his heart. To his private virtues, whenever he is left to their influence, I willingly concur in giving the moſt unqualified tribute of reſpect. And I do firmly believe, it is with no ſmall regret that he ſuffers his name to be even formally made uſe of, in avowing for a return of one of the Judges of the land with as much indifference and *non-chalance* as if he were a beaſt of the plough. I obſerve too, the dead ſilence into which the public is frowned by authority for the ſad occaſion. No man dares to mutter; no newſpaper dares to whiſper that ſuch a queſtion is afloat. It ſeems an enquiry among the tombs, or rather in the ſhades beyond them.

Ibant ſolâ ſub nocte per umbram.

I am glad it is ſo—I am glad of this factitious dumbneſs; for if murmurs dared to become audible, my voice would be too feeble to drown them; but when all is huſhed—when nature ſleeps—

Cum quies mortalibus ægris.

The weakeſt voice is heard—the ſhepherd's whiſtle ſhoots acroſs the liſtening darkneſs of the interminable heath, and gives notice that the wolf is upon his walk, and the ſame gloom and ſtillneſs that tempt the monſter to come abroad, facilitate the communication of the warning to beware. Yes, through that ſilence the voice ſhall be heard; yes, through that ſilence the ſhepherd ſhall be put upon his guard; yes, through that ſilence ſhall the felon ſavage be chaced into the toil. Yes, my Lords, I feel myſelf cheered and impreſſed by the compoſed and dignified attention with which I ſee you are diſpoſed to hear me on the moſt important queſtion that has ever been ſubjected to your conſideration; the moſt important to the deareſt rights of the human being; the moſt deeply intereſting and animating that can

beat

beat in his heart, or burn upon his tongue--Oh! how recreating is it to feel that occaſions may ariſe in which the ſoul of man may reaſſume her pretenſions; in which ſhe hears the voice of nature whiſper to her, *os homini ſublime dedi cælumque tueri*; in which even I can look *up* with calm ſecurity to the Court, and down with the moſt profound contempt upon the reptile I mean to tread upon! I ſay, reptile; becauſe, when the proudeſt man in ſociety becomes ſo the dupe of his childiſh malice, as to wiſh to inflict on the object of his vengeance the poiſon of his ſting, to do a reptile's work he muſt ſhrink into a reptile's dimenſion; and ſo ſhrunk, the only way to aſſail him is to tread upon him. But to the ſubject:—this writ of Habeas Corpus has had a return. That return ſtates, that Lord ELLENBOROUGH, Chief Juſtice of England, iſſued a warrant reciting the foundation of this diſmal tranſaction: that *one* of the Clerks of the Crown-office had certified to him, that an indictment had been found at Weſtminſter, charging the Hon. ROBERT JOHNSON, late of Weſtminſter, one of the Juſtices of his Majeſty's Court of Common Pleas in Ireland, with the publication of certain ſlanderous libels againſt the Government of that country; againſt the perſon of his Excellency Lord HARDWICKE, Lord Lieutenant of that country; againſt the perſon of Lord REDESDALE, the Chancellor of Ireland; and againſt the perſon of Mr. Juſtice OSBORNE, one of the Juſtices of the Court of King's Bench in Ireland. One of the Clerks of the Crown-office, it ſeems, certified all this to his Lordſhip. How many of thoſe there are, or who they are, or which of them ſo certified, we cannot preſume to gueſs, becauſe the learned and noble Lord is ſilent as to thoſe circumſtances. We are only informed that one of them made that important communication to his Lordſhip. It puts me in mind of the information given to one of Fielding's Juſtices: "did not", ſays his worſhip's wife, "the man with the wallet make his *fidavy* that you was a *vagram?*" I ſuppoſe it was ſome ſuch petty bag officer who gave Lord ELLENBOROUGH to underſtand that Mr. Juſtice JOHNSON was indicted. And being thus given to underſtand and be informed, he iſſued his warrant to a gentleman, no doubt of great reſpectability, a Mr. WILLIAMS, his tipſtaff, to take the body of Mr. Juſtice JOHNSON and bring him before a Magiſtrate, for the purpoſe of giving bail to appear within the firſt eight days of this Term, ſo that there might be a

trial within the ſittings after; and if, by the bleſſing of God, he ſhould be convicted, then to appear on the return of the *poſtea*, to be dealt with according to law.

Perhaps it may be a queſtion for you to decide, whether that warrant, ſuch as it may be, is not now abſolutely ſpent; and, if not, how a man can contrive to be hereafter in England on a day that is paſt? And high as the opinion may be in England of Iriſh underſtanding, it will be ſomething beyond even Iriſh exactneſs to bind him to appear in England not a fortnight hence, but a fortnight ago.—I wiſh, my Lords, we had the art of giving Time this retrograde motion. If poſſeſſed of the ſecret, we might poſſibly be diſpoſed to improve it from fortnights into years.

There is ſomething not incurious in the juxta-poſition of ſignatures. The warrant is ſigned by the Chief Juſtice of all England.—In muſic, the ear is reconciled to ſtrong tranſition of key by a preparatory reſolution of the intervening diſcords; but here, alas! there is nothing to break the fall: the auguſt title of Ellenborough is followed by the unadorned name of Brother Bell, the ſponſor of his Lordſhip's warrant. Let me not, however, be ſuffered to deem lightly of the compeer of the noble and learned Lord. Mr. Juſtice Bell ought to be a Lawyer; I remember him myſelf long a crier, and I know his credit with the State; he has had a *nolle proſequi*. I ſee not therefore why it may not fairly be ſaid "*fortunati ambo!*" It appears by this return, that Mr. Juſtice Bell indorſes this bill of lading to another conſignee, Mr. Medlicot, a moſt reſpectable gentleman; he deſcribes himſelf upon the warrant, and he gives a delightful ſpecimen of the adminiſtration of Juſtice, and the calendar of Saints in office; he deſcribes himſelf a Juſtice and a Peace Officer—that is, a Magiſtrate and a Catchpole:—So that he may receive informations as a Juſtice; if he can write, he may draw them as a Clerk; if not, he can execute the warrant as Bailiff; and, if it be a capital offence, you may ſee the Culprit, the Juſtice, the Clerk, the Bailiff, and the Hangman, together in the ſame cart; and, though he may not write, he may "ride and tie!" What a pity that their journey ſhould not be further continued together! That, as they had been "lovely in their lives, ſo in their deaths they might not be divided!" I find,

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my Lords, I have undeſignedly raiſed a laugh; never did I leſs feel merriment.--Let not me be condemned--let not the laugh be miſtaken.—Never was Mr. Hume more juſt than when he ſays, that " in many things the extremes are nearer to one another than the means."—Few are thoſe events that are produced by vice and folly, that fire the heart with indignation, that do not alſo ſhake the ſides with laughter. So when the two famous moraliſts of old beheld the ſad ſpectacle of life, the one burſt into laughter, the other melted into tears: they were each of them right, and equally right.

Si credas utrique
Res ſunt humanæ flebile ludibrium.

But theſe laughs are the bitter ireful laughs of honeſt indignation,—or they are the laughs of hectic melancholy and deſpair.

It is ſtated to you, my Lords, that theſe two Juſtices, if Juſtices they are to be called, went to the houſe of the defendant. I am ſpeaking to Judges, but I diſdain the paltry inſult it would be to them, were I to appeal to any wretched ſympathy of ſituation. I feel I am above it. I know the Bench is above it. But I know, too, that there are ranks, and degrees, and decorums to be obſerved; and, if I had a harſh communication to make to a venerable Judge, and a ſimilar one to his Crier, I ſhould certainly addreſs them in a very different language indeed. A Judge of the land, a man not young, of infirm health, has the ſanctuary of his habitation broken open by theſe two perſons, who ſet out with him for the coaſt, to drag from his country, to hurry him to a ſtrange land by the " moſt direct way!" till the King's writ ſtopt the malefactors, and left the ſubject of the King a waif dropt in the purſuit.

Is it for nothing, my Lords, I ſay this? Is it without intention I ſtate the facts in this way? It is with every intention. It is the duty of the public advocate not ſo to put forward the object of public attention, as that the ſkeleton only ſhall appear, without fleſh, or feature, or complexion. I mean every thing that ought to be meant in a Court of Juſtice. I mean not only that this execrable attempt

attempt ſhall be intelligible to the Court as a matter of *Law*, but ſhall be underſtood by the world as an act of *State*. If advocates had always the honeſty and the courage, upon occaſions like this, to deſpiſe all perſonal conſiderations, and to think of no conſequence but what may reſult to the Public from the faithful diſcharge of their ſacred truſt, theſe phrenetic projects of power, theſe atrocious aggreſſions on the liberty and happineſs of men, would not be ſo often attempted; for, though a certain claſs of delinquents may be ſcreened from puniſhment, they cannot be protected from hatred and deriſion. The great tribunal of reputation will paſs its inexorable ſentence upon their crimes, their follies, or their incompetency; they will ſink themſelves under the conſciouſneſs of their ſituation; they will feel the operation of an acid ſo neutralizing the malignity of their natures, as to make them at leaſt harmleſs, if it cannot make them honeſt. Nor is there any thing of riſk in the conduct I recommend. If the fire be hot, or the window cold, turn not your back to either; turn your face. So, if you are obliged to arraign the acts of thoſe in high ſtation, approach them not with malice, nor favour, nor fear. Remember, that it is the condition of guilt to tremble, and of honeſty to be bold; remember, that your falſe fear only can give them falſe courage:—that while you nobly avow the cauſe of truth, you will find her ſhield an impenetrable protection; and that no attack can be either hazardous or inefficient, if it be juſt and reſolute. —If Nathan had not fortified himſelf in the boldneſs and directneſs of his charge, he might have been hanged for the malice of his parable.

It is, my Lords, in this temper of mind, befitting every Advocate who is worthy of the name, deeply and modeſtly ſenſible of his duty, and proud of his privilege, equally exalted above the meanneſs of temporizing or of offending, moſt averſe from the unneceſſary infliction of pain upon any man or men whatſoever, that I now addreſs you on a queſtion, the moſt vitally connected with the liberty and well-being of every man within the limits of the Britiſh empire; which, if decided one way, he may be a freeman; which, if decided the other, he muſt be a ſlave. It is not the Iriſh nation only that is involved in this queſtion. Every member of the three realms is equally embarked; and would to

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God all England could liſten to what paſſes here this day! they would regard us with more ſympathy and reſpect, when the proudeſt Briton ſaw that his liberty was defended in what he would call a Provincial Court, and by a Provincial Advocate. The abſtract and general queſtion for your conſideration is this: my Lord Ellenborough has ſigned with his own hand a warrant, which has been indorſed by Mr. Bell, an Iriſh Juſtice, for ſeizing the perſon of Mr. Juſtice JOHNSON in Ireland, for conveying his perſon by the moſt direct way, in ſuch manner as theſe Bailiffs may chuſe, acroſs the ſea, and afterwards to the city of Weſtminſter, to take his trial for an alledged libel againſt the perſons entruſted with the government of Ireland, and to take that trial in a country where the ſuppoſed offender did not live at the time of the ſuppoſed offence, nor ſince a period of at leaſt 18 months previous thereto, has ever reſided; where the ſubject of his accuſation is perfectly unknown; where the conduct of his proſecutors, which has been the ſubject of the ſuppoſed libel, is equally unknown; where he has not the power of compelling the attendance of a ſingle witneſs for his defence. Under that warrant he has been dragged from his family: under that warrant he was on his way to the water's edge; his tranſportation has been interrupted by the writ before you, and upon the return of that writ ariſes the queſtion upon which you are to decide, the legality or illegality of ſo tranſporting him for the purpoſe of trial. I am well aware, my Lords, of the limits of the preſent diſcuſſion; if the law was clear in favour of the proſecutors, a moſt momentous queſtion might ariſe—how far they may be delinquents in daring to avail themſelves of ſuch a law for ſuch a purpoſe?—but I am aware that ſuch is not the preſent queſtion; I am aware that this is no Court of Impeachment; and therefore that your enquiry is not whether ſuch a power hath been criminally uſed, but whether it doth in fact exiſt. The arreſt of the defendant has been juſtified by the advocates of the Crown under the 44th of his preſent Majeſty. I have had the curioſity to enquire into the hiſtory of that act, and I find, that in the month of May, 1804, the brother-in-law of one of the preſent proſecutors obtained leave to bring in a bill to "render more eaſy the apprehending and bringing to trial offenders eſcaping from "one part of the United Kingdom to another, and alſo "from

" from one county to another." that bill was brought in; it travelled on in the caravan of Legiſlation unheeded and unnoticed, retarded by no difficulties of diſcuſſion or debate, and in due fulneſs of ſeaſon it paſſed into a law, which was to commence from and after the 1ſt of Auguſt, 1804. This act, like a young Hercules, began its exploits in the cradle. In the November following the preſent warrant was iſſued, under its ſuppoſed authority. Let me not be underſtood to ſay that the act has been ſlided through an unſuſpecting Legiſlature, under any particular influence, or for any particular purpoſe: that any ſuch man could be found, or any ſuch influence exiſt, or any ſuch lethargy prevail, would not, perhaps, be decent to ſuppoſe; ſtill leſs do I queſtion the legiſlative authority of Parliament. We all know that a Parliament may attaint itſelf; and that its omnipotence may equally extend in the ſame way to the whole body of the people. We know alſo that moſt unjuſt and cruel acts of attainder have been obtained by corrupt men in bad times; and if I could bring myſelf to ſay, which I do not, that this act was contrived for the mere purpoſe of deſtroying an obnoxious individual, I ſhould not heſitate to call it the moſt odious ſpecies of attainder that could be found upon the records of legiſlative degradation; becauſe, for the ſimple purpoſe of extinguiſhing an individual, it would ſweep the liberty of every being in the ſtate into the vortex of general and undiſtinguiſhing deſtruction. But theſe are points of view upon which the minds of the people of Ireland and England may dwell with terror, or indignation, or apathy, according as they may be fitted for liberty or for chains; but they are not points for the Court: and ſo I paſs them by. The preſent arreſt and detention are defended under the 44th of the King: are they warranted by that act? That is the only queſtion for you to decide; and you will arrive at that deciſion in the uſual courſe, by enquiring, firſt, how the law ſtood before upon the ſubject; next, what the imperfection or grievance of that law was; and thirdly, what the remedy intended to be applied by the act in queſtion?

Firſt, then, how ſtood the law before?—Upon this part it would be a parade of uſeleſs learning to go farther back than the ſtatute of Charles, the Habeas Corpus act, which

which is ſo juſtly called the ſecond Magna Charta of Britiſh liberty: what was the occaſion of that law? the arbitrary tranſportation of the ſubject beyond the realm; that baſe and malignant war, which the odious and deſpicable minions of power are for ever ready to wage againſt all thoſe who are honeſt and bold enough to deſpiſe, to expoſe, and to reſiſt them. Such is the oſcitancy of man, that he lies torpid for ages under theſe aggreſſions, until at laſt ſome ſignal abuſe, the violation of Lucrece, the death of Virginia, the oppreſſion of William Tell, ſhake him from his ſlumber. For years had thoſe drunken gambols of power been played in England; for years had the waters of bitterneſs been riſing to the brim; at laſt a ſingle drop cauſed them to overflow; the oppreſſion of a ſingle individual called the people of England from their ſleep—and what does that great ſtatute do? It defines and aſſerts the right, it points out the abuſe, and it endeavours to ſecure the right, and to guard againſt the abuſe, by giving redreſs to the ſufferer, and by puniſhing the offender; for years had it been the practice to tranſport obnoxious perſons out of the realm into diſtant parts, under the pretext of puniſhment, or of ſafe cuſtody. Well might they have been ſaid to be ſent "to that undiſcovered country from whoſe bourne no traveller returns," for of theſe wretched travellers how few ever did return? But of that flagrant abuſe this ſtatute has laid the axe to the root; it prohibits the abuſe; it declares ſuch detention or removal illegal; it gives an action againſt all perſons concerned in the offence, by contriving, writing, ſigning, counter-ſigning ſuch warrant, or adviſing, or aſſiſting therein. On the trial of any action for ſuch injury, it does that of which I remember no other inſtance; it leaves the Jury at liberty to give damages to any extent "above" five hundred pounds, but expreſsly forbids them to find any verdict of damages "below" it. It puts the offenders out of the King's protection, it forfeits their lands and goods, it diſables them from bearing any office of truſt or profit; and if the guilty miniſter of ſuch abuſe ſhould attempt to pour poiſon into the Sovereign's ear, and talk to him of mercy, it daſhes the phial from his hand; it takes away from the Crown the prerogative of pardon. Thus, haughtily and jealouſly, does this ſtatute reſtrain the abuſes that may be committed againſt the liberty of the ſubject by the Judge,

the Jury, or the Miniſter. One exception, and one exception only, does it contain:—It excepts from its protection by the 16th ſect. perſons who may have committed any "capital offence" in Scotland or Ireland. If the principle of that exception were now open to diſcuſſion, ſure I am that much might be ſaid againſt its policy. On the one ſide you would have to conſider the miſchief of letting this ſtatute protect a capital offender from puniſhment, by prohibiting his tranſmiſſion to that juriſdiction where his crime was committed, and where alone he could be tried. On the other, you would have to weigh the danger to be feared from the abuſe of ſuch a power, which, as the Habeas Corpus act ſtood, could not be reſorted to in any ordinary way; but was confined to the ſole and excluſive exerciſe of the adviſers of the prerogative. You would have to conſider whether it was more likely that it would be uſed againſt the guilty or the obnoxious; whether it was more likely to be uſed as an inſtrument of juſtice againſt the bad, or a pretext of oppreſſion againſt the good; and finally, whether you might not apply to the ſubject the humane maxim of our law—that better it is that one hundred guilty men ſhould eſcape, than that one innocent, and, let me add, meritorious man, ſhould ſuffer. But our anceſtors have conſidered the queſtion; they have decided; and, until we are better ſatisfied than I fear we can be, that we have not degenerated from their virtue, it can ſcarcely become us to paſs any light or haſty condemnation upon their wiſdom. In this great ſtatute, then, my Lords, you have the line of demarcation between the prerogative and the people, as well as between the criminal law and the ſubject, defined with all the exactneſs, and guarded by every precaution that human prudence could deviſe. Wretched muſt that Legiſlature be, whoſe acts you cannot trace to the firſt unchangeable principles of rational prerogative, of civil liberty, of equal juſtice! In this act you trace them all diſtinctly By this act you have a ſolemn legiſlative declaration, "that it is incompatible with liberty to ſend any ſubject out of the realm, "under pretence of any crime ſuppoſed or alledged to be "committed in a foreign juriſdiction, except that crime "be capital." Such were the bulwarks which our anceſtors drew about the ſacred Temple of Liberty—ſuch the ramparts by which they ſought to bar out the ever-

toiling

toiling ocean of arbitrary power; and thought, (generous credulity!) that they had barred it out from their poſterity for ever; little did they foreſee the future race of vermin that would work their way through thoſe mounds, and let back the inundation; little did they foreſee that their labours were ſo like thoſe frail and tranſient works that threatened for a while the haughty crimes and battlements of Troy, but ſo ſoon vaniſhed before the force of the trident and the impulſe of the waters; or that they were ſtill more like the forms which the infant's finger traces upon the beach; the next breeze, the next tide eraſes them, and comfounds them with the barren undiſtinguiſhed ſtrand. The ill-omened bird that lights upon it, ſees nothing to mark, to allure, or to deter, but finds all one obliterated unvaried waſte,

Et ſola ſecum ſicca ſpatiatur arena,

Still do I hope that this ſacred bequeſt of our anceſtors will have a more proſperous fortune, and be preſerved by a more religious and ſucceſsful care, a polar-ſtar to the wiſdom of the Legiſlator, and the integrity of the Judge.

As ſuch will I ſuppoſe its principle not yet brought into diſgrace; and as ſuch with your permiſſion will I ſtill preſume to argue upon that principle.

So ſtood the law till the two acts of the 23d and 24th of Geo. II. which relate wholly to caſes between county and county in England. Next followed the act of the 13th of his preſent Majeſty, which was merely a regulation between England and Scotland. And next came the act of the 44th of the preſent reign, upon which you are now called on to decide, which as between county and county is an incorporation of the two acts of Geo. II. And as between England, Scotland, and Ireland is nearly a tranſcript of the 13th of the King.

Under the 3d and 4th ſection of this laſt act the learned Counſel for the learned proſecutors (for really I think it only candid to acquit the Lord Lieutenant of the folly or the ſhame of this buſineſs, and to ſuppoſe that he is as innocent of the project from his temper, as he muſt from his education be ignorant of the ſubject) endeavour to juſtify

his proceeding. The conſtruction of this act they broadly and expreſsly contend to be this :—firſt, they aſſert that it extends not only to the higher crimes, but to all offences whatſoever :—ſecondly, that it extends not only to perſons who may have committed offences within any given juriſdictions, and afterwards eſcaped or gone out of ſuch juriſdictions, but to all perſons whether ſo eſcaping or going out or not :—thirdly, that it extends to conſtructive offences, that is, to offences committed againſt the laws of certain juriſdictions, committed in places not within them, by perſons that never put their feet within them, but by conſtruction of law committing them within ſuch juriſdictions and of courſe triable therein :—fourthly, that it extends peculiarly to the caſe of libels againſt the perſons entruſted with the powers of Government or with offices in the State :—and fifthly, that it extends not only to offences committed after the commencement of the act, but alſo to offences at any period however remotely previous to the exiſtence of the ſtatute ; that is, that it is to have an *ex-poſt facto* operation. The learned proſecutors have been forced into the neceſſity of ſupporting theſe laſt monſtrous poſitions, becauſe upon the return to the Writ, and upon the Affidavits it appears, and has been expreſsly admitted in the argument :—firſt, that the ſuppoſed libel upon theſe noble and learned proſecutors relates to the unhappy circumſtances that took place in Ireland on the 23d of July, 1803, and of courſe muſt have been publiſhed ſubſequent thereto :—and ſecondly, that Mr. Juſtice JOHNSON from the beginning of 1802 to the preſent hour was never for a moment in England but was conſtantly reſident in Ireland ; ſo that his guilt, whatever it be, muſt ariſe from ſome act, of neceſſity, committed in Ireland, and by no phyſical poſſibility committed or capable of being committed in England : theſe are the poſitions upon which a learned Chancellor and a learned Judge come forward to ſupport their cauſe and to ſtake their character, each in the face of his country, and both in the face of the Britiſh Empire : theſe are the poſitions, which, thank God, it belongs to my nature to abhor, and to my education to deſpiſe, and which it is this day my moſt prompt and melancholy duty to refute and to reſiſt—moſt prompt in obeying ; moſt grieved at the occaſion that calls for ſuch obedience.

We

We muſt now examine this act of the 44th of the King, and in doing ſo I truſt you will ſeek ſome nobler aſſiſtance than can be found in the principles or the practice of day-rules or ſide-bar motions; ſomething more worthy a liberal and learned Court acting under a religious ſenſe of their duty to their King, their Country, and their God, than the feeble and pedantic aid of a ſtunted verbal interpretation ſtraining upon its tiptoe to peep over the ſyllable that ſtands between it and meaning. If your object was merely to ſee if its words could be tortured into a ſubmiſſion to a vindictive interpretation, you would have only to endorſe the conſtruction that theſe learned proſecutors have put upon it, and that with as much grave deliberation as Mr. Juſtice BELL has vouchſafed to endorſe the Warrant which my Lord ELLENBOROUGH has thought fit to iſſue under its authority. You would then have only to look at it, *ut leguleius quidam cautus atque acutus, præcentor.*

Lord AVONMORE. No, Mr. CURRAN, you forget, it is not *præcentor*, it is *leguleius quidam cautus atque acutus, præco actionum cantor formarum auceps ſyllabarum.*

Mr. CURRAN I thank you my Lord for the aſſiſtance; and I am the more grateful, becauſe, when I conſider the laudable and ſucceſsful efforts that have been made of late to make ſcience domeſtic and familiar, and to emancipate her from the trammels of ſcholarſhip, as well as the juſt ſuſpicion under which the harbourers and abettors of thoſe outlawed claſſics have fallen, I ſee at what a riſque you have ventured to help me out. And yet ſee, my Lord, if you are prudent in truſting yourſelf to the honor of an accomplice. Think, ſhould I be proſecuted for this miſpriſion of learning, if I could reſiſt the temptation of eſcaping by turning evidence againſt ſo notorious a delinquent as you, my good Lord, and ſo confeſſedly more criminal than myſelf, or perhaps than any other man in the empire.

To examine this act then, my Lords we muſt revert to the three Engliſh ſtatutes of which it is a tranſcript. The firſt of theſe is the 23d of Geo. II. cap. 26. ſect. 11.

So much of the title as relates to our preſent enquiry is "for the apprehending of perſons in any county or place upon

upon Warrants granted by Juſtices of the Peace in any other county or place."

See now ſect. 11, that contains the preamble and enaction as to this ſubject :—

" And whereas it frequently happens that perſons, " againſt whom warrants are granted by Juſtices of the " Peace for the ſeveral counties within this kingdom, " eſcape into other counties or places out of the juriſdiction " of the Juſtices of the Peace granting ſuch Warrants, and " thereby avoid being puniſhed for the offences wherewith " they are charged :" ' For remedy whereof, be it enacted by ' the authority aforeſaid, that from and after the twenty-' fourth day of June, one thouſand ſeven hundred and ' fifty, in caſe any perſon againſt whom a legal Warrant ' ſhall be iſſued, by any Juſtice or Juſtices of the Peace ' for any county, riding, diviſion, city, liberty, town or ' place within this kingdom, ſhall eſcape or go into any ' other county, riding, diviſion, city, liberty, town or ' place out of the juriſdiction of the Juſtice or Juſtices ' granting ſuch Warrant as aforeſaid it ſhall and may be ' lawful for any Juſtice of the Peace of the county, riding, ' diviſion, city, liberty, town or place, to which ſuch ' perſon ſhall have gone or eſcaped, to endorſe ſuch ' Warrant, upon application made to him for that purpoſe ' and to cauſe the perſon againſt whom the ſame ſhall ' have been iſſued to be apprehended and ſent to the ' Juſtice or Juſtices who granted ſuch Warrant or to ſome ' other Juſtice or Juſtices of the county, riding, diviſion, ' city, liberty, town or place from whence ſuch perſon ' ſhall have gone or eſcaped, to the end that he or ſhe may ' be dealt with according to law, any law or uſage to the ' contrary notwithſtanding.'

This act was amended by the 24th of the ſame Reign, the title of which was, " An act for amending and " making more effectual a clauſe in an act paſſed in the " laſt Seſſion of Parliament, for the apprehending of " perſons in any county or place upon Warrants granted " by Juſtices of the Peace of any other county or place."

It

It then recites the 11th ſection of the 23d Geo. II. and proceeds, "And whereas ſuch offender or offenders may "reſide or be in ſome other county, riding, diviſion, city, "liberty, town or place out of the juriſdiction of the "Juſtice or Juſtices granting ſuch Warrant as aforeſaid, "before the granting ſuch Warrant, and without eſcaping "or going out of the county, riding, diviſion, city, liberty, "town or place after ſuch Warrant granted."

I ſhall reſerve a more particular examination of theſe two acts for that head of my argument that ſhall neceſſarily require it. At preſent I ſhall only obſerve; firſt, that they are manifeſtly proſpective; ſecondly, that they operate only as between county and county in England; thirdly, that they clearly and diſtinctly go to all offenders whatſoever, who may avoid trial and puniſhment of their offences by eſcaping from the juriſdiction in which they were committed, and were of courſe triable and puniſhable; and fourthly, that proviſion is made for bailing the perſons ſo arreſted in the place where taken, if the offences charged upon them were bailable by law.

In the 13th of his preſent Majeſty it was thought fit to make a law with reſpect to criminals eſcaping from England to Scotland, and *vice verſa*: of that act the preſent ſtatute of the 44th is a tranſcript. And upon this ſtatute ariſes the firſt queſtion made by the proſecutors; namely, whether like the acts of the 23d and 24th of Geo. II. which were merely between county and county, it extended indiſcriminately to the loweſt as well as the higheſt offences? or whether the 13th and 44th which go to kingdom and kingdom are not confined to ſome and to what particular ſpecies of offences? The preamble to theſe two ſtatutes ſo far as they bear upon our preſent queſtion is contained in the 3d ſection of the 44th, the act now under conſideration. And there is not a word in it that is not moſt material. It ſays, "Whereas, it may frequently happen that felons and other malefactors in Ireland may make their eſcape into Great Britain, and alſo that felons and other malefactors in Great Britain may make their eſcape into Ireland, whereby their crimes remain unpuniſhed." There being no ſufficient proviſion by the laws now in force in Great Britain and Ireland reſpectively for apprehending ſuch offenders and tranſmitting

ting them into that part of the United Kingdom in which their offences were committed. For remedy whereof, &c. and if any perſon againſt whom a Warrant ſhall be iſſued by any Juſtice of the Peace in Ireland for any crime or offence againſt the laws of Ireland, ſhall eſcape, go into, reſide, or be in any place in England or Scotland, it ſhall be lawful for any Juſtice of the Peace for the place, whither or where ſuch perſons ſhall eſcape, &c. to endorſe his name on ſuch Warrant; which Warrant ſo endorſed ſhall be a ſufficient authority to the perſon bringing it to execute the ſame by apprehending the perſon againſt whom it is granted, and to convey him by the moſt direct way into Ireland and before a Juſtice living near the place where he ſhall land, which Juſtice ſhall proceed with regard to him as if he had been legally apprehended in ſuch county of Ireland. The 4th ſection makes the ſame proviſion for eſcapes from England or Scotland into Ireland. The ſtatutes goes on and directs that the expences of ſuch removal ſhall be repaid to the perſon defraying the ſame by the treaſurer of the county in which the crime was committed, and the treaſurer is to be allowed for it in his accounts.

To ſupport the conſtruction that takes in all poſſible offences of all poſſible degrees, you have been told, and upon the grave authority of notable caſes, that the enacting part of a ſtatute may go beyond its preamble; that it cannot be reſtrained by the preamble, and ſtill leſs by the title; that here the enacting clauſe was the words "any offence," and that "any offence" muſt extend to every offence, and of courſe to the offence in queſtion. If the queſtion had been of a lighter kind you might perhaps have ſmiled at the parade of authorities produced to eſtabliſh what no Lawyer ever thinks of denying. They would have acted with more advantage to the juſtice of the country, though perhaps not to the wiſhes of their clients, if they had reminded your Lordſhips, that in the conſtruction of ſtatutes, the preamble and even the title itſelf may give ſome aſſiſtance to the Judge in developing its meaning and its extent; if they had reminded you, that remedied laws are to be conſtrued liberally, and penal laws with the utmoſt ſtrictneſs and caution. And when they contend that a ſuppoſed libel is within the letter of this law, they would have done well to have added, that it is a maxim that there may be caſes within

within the letter of a ſtatute which, notwithſtanding, the Judge is bound to reject from its operation as being incompatible with its ſpirit. They would have done well in adding, that the Judge is bound ſo to conſtrue all laws as not to infringe upon any of the known rules of religion or morality—any of the known rules of diſtributive juſtice—any of the eſtabliſhed principles of the liberties and rights of the ſubject—and that it is no more than a decent and becoming deference to the Legiſlator to aſſume as certain, that whatever words he may have uſed, he could not poſſibly have meant any thing that upon the face of it was palpably abſurd, immoral, or unjuſt. Theſe are the principles on which I am perſuaded this Court will always act, becauſe I know them to be the principles on which every Court of Juſtice ought to act. And I abſtain ſtudiouſly from appealing to any judicial deciſions in ſupport of them, becauſe to fortify them by precedent or authority would be to ſuppoſe them liable to be called in queſtion. There is another rule which I can eaſily excuſe learned gentlemen from adverting to, and that is, that when many ſtatutes are made in *pari materia*, any one of them is to be conſtrued not independantly of the others, but with a reference to the entire code of which it is only a component part.

On theſe grounds then, I ſay, the 44th was not, and could not be intended to go to all offences whatſoever.

Firſt, becauſe the acts of 23d and 24th Geo. II. had already deſcribed "all perſons" by words of the moſt general and comprehenſive kind. If the framers of the 13th and 44th meant to carry theſe acts to the ſame length, they had the words of the former acts before their eyes, and yet they have uſed very different words: a clear proof, in my mind, that they meant to convey a very different meaning. In theſe latter acts they uſe very ſingular words—"felons and other malefactors;"—that theſe words are ſomewhat looſe and indefinite I make no difficulty of admitting: but will any man that underſtands Engliſh deny, that they deſcribe offences of an higher and more enormous degree? You are told, that felon does not neceſſarily mean a capital offender, becauſe there are felonies not capital, the name being derived from the forfeiture not of life, but of property. You are alſo told, that "malefactors"

means generally an ill-doer, and, in that ſenſe, that every offender is a malefactor: but the 13th and 44th ſtates this claſs to be felons and malefactors, for whoſe tranſmiſſion from kingdom to kingdom "no ſufficient pro-"viſion was made by the laws now in force." Now I think it is not unfair reaſoning to ſay, that this act extends to a claſs of offenders whoſe tranſmiſſion was admitted to be not incompatible with the juſt liberty of the ſubject of England; but for whoſe tranſmiſſion the Legiſlature could not ſay there was *no* proviſion; but for whoſe tranſmiſſion it was clear that there was not a ſufficient proviſion, though there was ſome proviſion. If you can find any claſs ſo circumſtanced, that is, excluſively liable by law to be ſo tranſmitted, the meaning of the words "felons "and other malefactors," becomes fixed, and muſt neceſſarily refer to ſuch claſs.

Now that claſs is expreſsly deſcribed in the Habeas Corpus act, becauſe it declares the tranſmiſſion of all perſons to be illegal, except only perſons charged with capital crimes; for their apprehenſion and tranſmiſſion there was a proviſion, the *mandatum regis*; that is, the diſcretionary exerciſe of the prerogative. That power had theretofore been uſed in caſes of treaſon, as in Lundy's caſe; ſo in the caſe of Lord Sanchar; Carliel, the principal in the murder of Turner, committed in London by the procurement of Lord Sanchar, was arreſted in Scotland, whither he had fled, by the order of King James the Firſt, and brought back to England, where he was executed for the crime, as was Lord S. the acceſſary before the fact; but ſuch interference of the prerogative might be granted or with-held at pleaſure, could be applied for only with great difficulty and expence; and therefore might well be called an inſufficient proviſion. No proviſion for ſuch a purpoſe can be ſufficient, unleſs, inſtead of depending on the caprice of men in power, it can be reſorted to in the ordinary courſe of law. You have, therefore, my Lords, to elect between two conſtructions; one, which makes an adequate proviſion for carrying the exception in the 16th ſection of the Habeas Corpus act into effect; and the other, a complete and radical repeal of that ſacred ſecurity for the freedom of Engliſhmen.—But further, the ſpirit and the letter of the Habeas Corpus

law

law is, that the party arrested shall, without a moment's delay, be bailed, if the offence be bailable; but if misdemeanors are within this act, then an English subject, arrested under an Irish warrant, cannot be bailed within any part of the realm of England, but must be carried forward, in the custody of Irish bailiffs, to the sea-shore of his country, where he is to be embarked in such vessel as they think proper; and, if it should be the good pleasure of his guardians to let him land alive in any part of Ireland, then, and not till then, may he apply to an Irish Justice to admit him to bail in a foreign country, where he is a perfect stranger, and where none but an idiot could expect to find any man disposed to make himself responsible for his appearance. Can you, my Lords, bring your minds easily to believe that such a tissue of despotism and folly could have been the sober and deliberate intention of the Legislature? But further, under the acts of George II. even from one county to the next, the warrant by the first Justice must be authenticated upon oath, before it can be indorsed by the second; but, in this act, between, perhaps, the remotest regions of different kingdoms, no authentication is required; and, upon the indorsement of, perhaps, a forged warrant, which the English Justice has no means of enquiring into, a British subject is to be marched through England, and carried over sea to Ireland, there to learn in the county of Kerry, or Galway, or Derry, that he had been torn from his family, his friends, his business, to the annihilation of his credit, the ruin of his affairs, the destruction of his health, in consequence of a mistake, or a practical joke, or an inhuman and remorseless project of vindictive malice; and that he is then at liberty to return, if he is able; that he may have a good action at law against the worthy and responsible bailiff that abused him, if he is foolish enough to look for him, or unfortunate enough to find him. Can you, my Lords, be brought seriously to believe, that such a construction would not be the foulest aspersion upon the wisdom and justice of the Legislature?

I said, my Lords, that an Englishman may be taken upon the indorsement of a forged warrant. Let me not be supposed such a simpleton as to think that the danger of forgery makes a shade of difference in the subject. I know

too well that Calendar of Saints, the Iriſh Juſtices; I am too much in the habit of proſecuting and defending them every term and every commiſſion, not to be able to gueſs at what price a cuſtomer might have real warrants by the dozen; and, without much ſagacity, we might calculate the average expence of their indorſement at the other ſide of the water.—But, further: yet the act provides that the expence of ſuch tranſmiſſion ſhall be paid, at the end of the journey, by the place where the crime has been committed—but, who is to ſupply the expences by the way? what ſort of proſecutors do you think the more likely to advance thoſe expences, an angry miniſter, or a vindictive individual?—I can eaſily ſee that ſuch a conſtruction would give a moſt effectual method of getting rid of a troubleſome political opponent; or a rival in trade; or a rival in love; or of quickening the undutiful lingering of an anceſtor that felt not the maturity of his heir; but I cannot bring myſelf to believe that a ſober Legiſlature, when the common rights of humanity ſeem to be beaten into their laſt entrenchment, and to make their laſt ſtand, I truſt in God a ſucceſsful one, in the Britiſh empire, would chuſe exactly that aweful criſis for deſtroying the moſt vital principles of common juſtice and liberty, or of ſhewing to theſe nations that their treaſure and their blood were to be waſted in ſtruggling for the noble privilege of holding the right of freedom, of habitation, and of country, at the courteſy of every little irritable Officer of State, or of our worſhipful Rivets, and Bells, and Medlicots, and their truſty and well-beloved couſins and catchpoles.

But, my Lords, even if the proſecutor ſhould ſucceed, which, for the honour and character of Ireland, I truſt he cannot, in wringing from the Bench an admiſſion that all offences whatſoever are within this act, he will have only commenced his honourable cauſe, he will only have arrived at the veſtibule of atrocity. He has now to ſhew that Mr. JOHNSON is within the deſcription of a malefactor, making his eſcape into Ireland, whereby his offence may remain unpuniſhed, and liable to be arreſted under a warrant indorſed in that place whither or where ſuch perſon ſhall eſcape, go into, reſide, or be. For this enquiry you muſt refer to the 23d and 24th Geo. II. The firſt of theſe, 23d, c. 11, recites the miſchief—"that perſons againſt

"whom

" whom warrants are granted *eſcape* into other counties, " and thereby avoid being puniſhed."—The enacting part then gives the remedy:—" the Juſtice for the place into " which *ſuch* perſon ſhall have gone or eſcaped, ſhall in- " dorſe the original warrant, and the perſon accuſed ſhall " thereunder be ſent to the Juſtice who granted it, to be " by him dealt with, &c."

If words can be plain, theſe words are ſo—they extend to perſons actually committing crimes within a juriſdiction, and actually eſcaping into ſome other after warrant granted, and thereby avoiding trial.—In this act there were found two defects:—firſt, it did not comprehend perſons changing their abode before warrant iſſued, and whoſe removing, as not being a direct flight from purſuit, could ſcarcely be called an eſcape;—ſecondly, it did not give the ſecond Juſtice a power to bail.—And here you ſee how eſſential to juſtice it was deemed, that the perſon arreſted ſhould be bailed on the ſpot and the moment of arreſt, if the charge was bailable.

Accordingly, the 24th Geo. II. cap. 55, was made;—After reciting the former act, and the claſs of offenders thereby deſcribed, namely, actual offenders actually eſcaping, it recites that " whereas *ſuch offenders* may reſide or be in " ſome other county before the warrant granted, and " without eſcaping or going out of the county after ſuch " warrant granted," it then enacts, " that the Juſtice for " ſuch place where ſuch perſon ſhall eſcape, go into, reſide, " or be, ſhall indorſe, &c. and may bail if bailable, or " tranſmit, &c."

Now the conſtruction of theſe two acts taken together is manifeſtly this:—it takes in every perſon who being in any juriſdiction, and committing an offence therein, eſcaping after warrant, or without eſcaping after warrant, going into ſome other juriſdiction, and who ſhall there *reſide*, that is permanently abide, or *ſhall be*, that is not permanently, ſo as to be called a reſident.

Now here it is admitted, that Mr. JOHNSON was not within the realm of England ſince the beginning of 1802, more than a year before the offence exiſted; and therefore you

you are gravely called upon to say that he is a person who made his escape *from* a place where he never was, and into a place which he had never left.—To let in this wise and humane construction, see what you are called upon to do—the statute makes such persons liable to arrest if they shall have done certain things, to wit, if they shall escape, go into, reside, or be; but if the fact of simply being, *i. e.* existing in another jurisdiction, is sufficient to make them so liable, it follows of course, that the two only verbs that imply doing any thing, that is, *escape or go into*, must be regarded as superfluous, that is, that the Legislature had no idea whatsoever to be conveyed by them when they used them, and therefore are altogether expunged and rejected.

Such, my Lords, are the strange and unnatural monsters that may be produced by the union of malignity and folly. I cannot but own that I feel an indignant, and, perhaps, ill-natured satisfaction, in reflecting that my own country cannot monopolize the derision and detestation that such a production must attract. It was originally conceived by the wisdom of the East; it has made its escape, and come into Ireland under the sanction of the first criminal Judge of the empire: where, I trust in God, we shall have only to feel shame or anger at the insolence of the visit, without the melancholy aggravation of such an execrable guest continuing *to reside or to be* among us. On the contrary, I will not dismiss the cheering expectation from my heart, that your decision, my Lords, will shew the British nation, that a country having as just and as proud an idea of liberty as herself, is not an unworthy ally in the great contest for the rights of humanity; is no unworthy associate in resisting the progress of barbarity and military despotism; and in defending against its enemies that great system of British Freedom, in which we have now a common interest, and under the ruins of which, if it should be overthrown, we must be buried in a common destruction.

I am not ignorant, my Lords, that this extraordinary construction has received the sanction of another Court, nor of the surprise and dismay with which it smote upon the general heart of the Bar. I am aware that I may have the mortification of being told in another country of that unhappy decision, and I foresee in what confusion I shall

hang

hang down my head when I am told it. But I cherish too the conſolatory hope, that I ſhall be able to tell them that I had an old and learned friend, whom I would put above all the ſweepings of their hall, who was of a different opinion; who had derived his ideas of civil liberty from the pureſt fountains of Athens and of Rome; who had fed the youthful vigour of his ſtudious mind with the theoretic knowledge of their wiſeſt philoſophers and ſtateſmen; and who had refined that theory into the quick and exquiſite ſenſibility of moral inſtinct, by contemplating the practice of their moſt illuſtrious examples; by dwelling on the ſweet ſoul'd piety of Cymon; on the anticipated chriſtianity of Socrates; on the gallant and pathetic patriotiſm of Epaminondas; on that pure auſterity of Fabricius, whom to move from his integrity would have been more difficult than to have puſhed the ſun from his courſe. I would add, that if he had ſeemed to heſitate, it was but for a moment; that his heſitation was like the paſſing cloud that floats acroſs the morning ſun, and hides it from the view, and does ſo for a moment hide it by involving the ſpectator without even approaching the face of the luminary: And this ſoothing hope I draw from the deareſt and tendereſt recollections of my life, from the remembrance of thoſe attic nights and thoſe refections of the gods which we have ſpent with thoſe admired and reſpected and beloved companions who have gone before us;—over whoſe aſhes the moſt precious tears of Ireland have been ſhed: yes, my good Lord, I ſee you do not forget them; I ſee their ſacred forms paſſing in ſad review before your memory; I ſee your pained and ſoftened fancy recalling thoſe happy meetings, when the innocent enjoyment of ſocial mirth expanded into the nobler warmth of ſocial virtue, and the horizon of the board became enlarged into the horizon of man;—when the ſwelling heart conceived and communicated the pure and generous purpoſe,—when my ſlenderer and younger taper imbibed its borrowed light from the more matured and redundant fountain of yours. Yes, my Lord, we can remember thoſe nights without any other regret than that they can never more return, for

"We ſpent them not in toys, or luſt, or wine;
"But ſearch of deep philoſophy,
"Wit eloquence and poeſy,
"Arts which I lov'd, for they, my friend, were thine."

But

But, my Lords, to return to a ſubject from which to have thus far departed, I think may not be wholly without excuſe. The expreſs object of the 44th was to ſend perſons *from* places where they were not triable by law back to the places that had juriſdiction to try them. And in thoſe very words does Mr. Juſtice Blackſtone obſerve on the 13th of the King, that it was made to prevent impunity by eſcape, by giving a power of "ſending back" ſuch offenders as had ſo eſcaped.

This topic of argument would now naturally claim its place in the preſent diſcuſſion. I mention it now that it might not be ſuppoſed that I meant to pretermit ſo important a conſideration. And I only mention it, becauſe it will connect itſelf with a ſubſequent head of this enquiry in a manner more forcibly applicable to the object, when I think I may venture to ſay, it will appear to demonſtration, that if the offence charged upon the defendant is triable at all, it is triable in Ireland and no where elſe; and of courſe that the proſecutors are acting in direct violation of the ſtatute, when they ſeek to tranſport him from a place where he can be tried, into another country that can have no poſſible juriſdiction over him.

Let us now, my Lords, examine the next poſition contended for by thoſe learned proſecutors. Having laboured to prove that the act applies not merely to capital crimes, but to all offences whatſoever; having laboured to ſhew that an act for preventing impunity by eſcape extends to caſes not only where there was no eſcape, but where eſcape in fact was phyſically impoſſible; they proceed to put forward boldly a doctrine which no Lawyer, I do not heſitate to ſay it, in Weſtminſter-hall would have the folly or the temerity to advance; that is, that the defendant may by conſtruction of law be guilty of the offence in Weſtminſter though he ſhould never have paſſed within its limits till he was ſent thither to be tried: with what a fatal and inexorable uniformity do the tempers and characters of men domineer over their actions and conduct! How clearly muſt an Engliſhman, if by chance there be any now liſtening to us diſcern the motives and principles that dictated the odious perſecutions of 1794 re-aſſuming their operations; forgetting that public ſpirit by which they were fruſtrated; unappalled

unappalled by fear, undeterred by ſhame, and returning again to the charge; the ſame wild and impious nonſenſe of conſtructive criminality, the ſame execrable application of the ill-underſtood rules of a vulgar, clerk-like, and illiterate equity, to the ſound and plain and guarded maxims of the criminal law of England! the pureſt, the nobleſt, the chaſteſt ſyſtem of diſtributive juſtice that was ever venerated by the wiſe, or perverted by the fooliſh, or that the children of men in any age or climate of the world have ever yet beheld; the ſame inſtruments, the ſame movements, the ſame artiſts, the ſame doctrines, the ſame doctors, the ſame ſervile and infuriated contempt of humanity, and perſecution of freedom! the ſame ſhadows of the varying hour that extend or contract their length, as the beam of a riſing or a ſinking ſun plays upon the gnomon of ſelf-intereſt! how demonſtratively does the ſame appetite for mice authenticate the identity of the transformed princeſs that had been once a cat!

But it ſeems as if the whole order and arrangement of the moral and the phyſical world had been contrived for the inſtruction of man, and to warn him that he is not immortal. In every age, in every country do we ſee the natural riſe, advancement, and decline of virtue and of ſcience. So it has been in Greece, in Rome, ſo it muſt be, I fear, the fate of England. In ſcience, the point of its maturity and manhood is the commencement of its old age: the race of writers, and thinkers, and reaſoners paſſes away, and gives place to a ſucceſſion of men that can neither write, nor think, nor reaſon. The Hales, the Holts, and the Somers ſhed a tranſient light upon mankind, but are ſoon extinct and diſappear, and give place to a ſuperficial and over-weening generation of laborious and ſtrenuous idlers,—of ſilly ſcholiaſts, of wrangling mooters, of proſing garruliſts who explore their darkling aſcent upon the ſteps of ſcience, by the baluſtrade of caſes and manuſcripts, who calculate their depth by their darkneſs, and fancy they are profound becauſe they feel they are perplexed. When the race of the Paladios is extinct, you may expect to ſee a clumſy hod-man collected beneath the ſhade of his ſhoulders, *αυτης νευστε μεγαιτε εξοχος αυδρωπων κεφαλην και, χειρας αμφις*, affecting to fling a builder's glance upon the

temple, on the proportion of its pillars; and to pass a critic's judgment on the doctrine that should be preached within them.

Let it not, my Lords, be considered amiss, that I take this up rather as an English than an Irish question. It is not merely because we have no Habeas Corpus law in existence (the antiquarian may read of it, though we do not enjoy it); it is not merely because my mind refuses itself to the delusion of imaginary freedom, and shrinks from the meanness of affecting an indignant haughtiness of spirit that belongs not to our condition, that I am disposed to argue it as an English question; but it is because I am aware, that we have now a community of interest and of destiny that we never had before—because I am aware, that, blended as we now are, the liberty of man must fall where it is highest, or rise where it is lowest, till it finds its common level in the common empire—and because, also, I wish that Englishmen may see, that we are conscious that nothing but mutual benevolence and sympathy can support the common interest that should bind us against the external or the intestine foe; and that we are willing, whenever that common interest is attacked, to make an honest and animated resistance, as in a common cause, and with as cordial and tender an anxiety for their safety as for our own.

Let me now briefly, because no subject can be shorter or plainer, consider the principle of local jurisdictions, and constructive crimes:—

A man is bound to obedience, and punishable for disobedience, of laws:—first, because, by living within their jurisdiction, he avails himself of their protection; and this is no more than the reciprocality of protection and allegiance on a narrower scale—and secondly, because, by so living within their jurisdiction he has the means of knowing them, and cannot be excused because of his ignorance of them. I should be glad to know, upon the authority of what manuscript, of what pocket case, the soundness of these principles can be disputed? I should be glad to know, upon what known principle of English law a Chinese, or a Laplander, can be kidnapped into England, and arraigned for a crime which he committed under the pole,

pole, to the injury of a country which he had never seen—in violation of a law which he had never known, and to which he could not owe obedience—and, perhaps, for an act, the nonperformance of which might have forfeited his liberty or his life to the laws of that country which he was bound to know, and was bound to obey? Very differently did our ancestors think of this subject:—They thought it essential to justice, that the jurisdiction of criminal law should be local and defined—that no man should be triable but there where he was accused of having actually committed the offence; where the character of the prosecutor, where his own character was known, as well as the characters of the witnesses produced against him; and where he had the authority of legal process to enforce the attendance of witnesses for his defence. They were too simple to know any thing of the equity of criminal law. Poor Bracton or Fleta would have stared if you had asked them, "What, gentlemen, do you mean to say, that such a crime as this shall escape from punishment?" Their answer would have been, no doubt, very simple and very foolish: they would have said, "We know there are many actions that we think bad actions, that yet are not punishable, because not triable by law; and that are not triable, because of the local limits of criminal jurisdictions." And, my Lords, to shew with what a religious scrupulosity the locality of jurisdictions was observed, you have an instance in the most odious of all offences, treason only excepted—I mean the crime of wilful murder. By the common law, if a man in one county procured a murder to be committed, which was afterwards actually committed in another, such procurer could not be tried in either jurisdiction, because the crime was not completed in either. This defect was remedied by the act of Edward VI. which made the author of the crime amenable to justice: But in what jurisdiction did it make him amenable? was it there where the murder was actually perpetrated?—by no means; but there only in which he had been guilty of the procurement, and where alone his accessorial offence was completed. And here you have the authority of Parliament for this abstract position, that where a man living in one jurisdiction does an act, in consequence of which a crime is committed within another jurisdiction, he is by law triable only where his own personal act of procurement was committed, and not there

where the procured or projected crime actually took effect. In anſwer to theſe known authorities of common law, has any ſtatute, has a ſingle deciſion or even dictum of a Court, been adduced? Or, in an age in which the paſtry-cooks and ſnuff-ſhops have been defrauded of their natural right to theſe compoſitions that may be uſeful without being read, has even a ſingle manuſcript been offered to ſhew the reſearches of theſe learned proſecutors, or to ſupport their cauſe? No, my Lords; there has not.

I ſaid, my Lords, that this was a fruit from the ſame tree that produced the ſtupid and wicked proſecutions of 1794: let me not be ſuppoſed to ſay it is a mere repetition of that attempt, without any additional aggravation. In 1794, the deſign, and odious enough it was, was confined to the doctrine of conſtructive guilt; but it did not venture upon the atrocious outrage of a ſubſtituted juriſdiction: the Engliſhman was tried on Engliſh ground, where he was known, where he could procure his witneſſes, where he had lived, and where he was accuſed of the crime, whether actual or conſtructive; but the locality of the trial defeated the infernal malice of thoſe proſecutions. The ſpeeches of half the natural day, where every Jury-man had his hour, were the knell of ſleep, but they were not the knell of death. The project was expoſed, and the deſtined victims were ſaved. A piece ſo damned could not ſafely be produced again on the ſame ſtage. It was thought wiſe, therefore, to let ſome little time paſs, and then to let its author produce it on ſome diſtant provincial Theatre for his own benefit, and at his own expence and hazard. To drag an Engliſh Judge from his Bench, or an Engliſh Member of Parliament from the Senate, and in the open day, in the city of London, to ſtrap him to the roof of a mail-coach, or pack him up in a waggon, or hand him over to an Iriſh bailiff, with a rope tied about his leg, to be goaded forward like an ox, on his way to Ireland, to be there tried for a conſtructive miſdemeanor, would be an experiment, perhaps, not very ſafe to be attempted. Theſe Merlins, therefore, thought it prudent to change the ſcene of their ſorcery;

Modo Romæ, modo ponit Athenis!

The

The people of England might, perhaps, enter into the feelings of ſuch an exhibition with an officiouſneſs of ſympathy, not altogether for the benefit of the contrivers—

Nec natos coram populo Medea trucidet—

and it was thought wiſe to try the ſecond production before ſpectators whoſe necks were pliant, and whoſe hearts were broken; where every man who dared to refuſe his worſhip to the golden calf, would have the furnace before his eyes, and think that it was at once uſeleſs and dangerous to ſpeak, and diſcreet at leaſt, if it was not honeſt, to be ſilent.—I cannot deny that it was prudent to try an experiment, that, if ſucceſsful, muſt reduce an Engliſhman to a ſtate of ſlavery more abject and forlorn than that of the Helots of Sparta, or the Negroes of your plantations—for ſee, my Lords, the extent of the conſtruction now broadly and directly contended for at your Bar:—The King's peace in Ireland, it ſeems, is diſtinct from his peace in England, and both are diſtinct from his peace in Scotland; and, of courſe, the ſame act may be a crime againſt each diſtinct peace, and ſeverally and ſucceſſively puniſhable in each country—ſo much more inveterate is the criminality of a conſtructive than of an actual offence. So that the ſame man for the ſame act againſt laws that he never heard of, may be puniſhed in Ireland, be then ſent to England by virtue of the warrant of Mr. Juſtice Bell, indorſed by my Lord Ellenborough, and, after having his health, his hopes, and his property deſtroyed for his conſtructive offences againſt his Majeſty's peace in Ireland, and his Majeſty's peace in England, he may find that his Majeſty's peace in the Orkneys has, after all, a veſted remainder in his carcaſs; and, if it be the caſe of a libel, for the full time and term of fourteen years from the day of his conviction before the Scottiſh juriſdiction, to be fully completed and determined. Is there, my Lords, can there be a man who hears me, that does not feel that ſuch a conſtruction of ſuch a law would put every individual in ſociety under the deſpotical dominion, would reduce him to be the deſpicable chattel, of thoſe moſt likely to abuſe their power, the profligate of the higher, and the abandoned of the lower orders, to the remorſeleſs malice of a vindictive miniſter, to the ſervile inſtrumentality of a trading Juſtice?—Can any man who hears me conceive any poſſible caſe of abduction of rape or of murder that may not

be

be perpetrated, under the conſtruction now ſhamelesly put forward?—Let us ſuppoſe a caſe:—By this conſtruction a perſon in England, by procuring a miſdemeanor to be committed in Ireland, is conſtructively guilty in Ireland, and, of courſe, triable in Ireland—let us ſuppoſe that Mr. Juſtice Bell receives, or ſays he receives information, that the lady of an Engliſh Nobleman wrote a letter to an Iriſh Chambermaid, counſelling her to ſteal a row of pins from an Iriſh Pedlar, and that the ſaid row of pins was, in conſequence of ſuch advice and counſel, actually ſtolen, againſt the Iriſh peace of our Lord the King; ſuppoſe my Lord Ellenborough, knowing the ſignature, and reverencing the virtue of his tried and valued colleague, indorſes this warrant; is it not clear as the ſun that this Engliſh lady may, in the dead of night, be taken out of her bed, and ſurrendered to the mercy of two or three Iriſh bailiffs, if the Captain that employed them ſhould happen to be engaged in any cotemporary adventure nearer to his heart, without the poſſibility of any legal authority interpoſing to ſave her, to be matronized in a journey by land, and a voyage by ſea, by ſuch modeſt and reſpectable guardians, to be dealt with during the journey as her companions might think proper—and to be dealt with after by the worſhipful correſpondent of the noble and learned Lord, Mr. Juſtice Bell, according to law?—I can, without much difficulty, my Lords, imagine, that after a year or two had been ſpent in accounts current, in drawing and redrawing for human fleſh between our worthy Bells and Medlicotts on this ſide of the water, and their noble or their ignoble correſpondents on the other, that they might meet to ſettle their accounts, and adjuſt their balances. I can conceive that the items might not be wholly deſtitute of curioſity:—Brother B. I take credit for the body of an Engliſh patriot.—Brother E. I ſet off againſt it that of an Iriſh Judge.—Brother B. I charge you in account with three Engliſh Biſhops.—Brother E. I ſet off Mrs. M'Lean and two of her chickens; petticoat againſt petticoat.—Brother B. I have ſent you the body of a moſt intractable diſturber, a fellow that has had the impudence to give a threſhing to Bonaparte himſelf; I have ſent you Sir Sidney.—Dearest Brother E.——But, I ſee my learned opponents ſmile—I ſee their meaning.——I may be told, that I am putting imaginary and ludicrous, but not probable, and, therefore, not ſuppoſable caſes.—But I anſwer, that reaſoning

ſoning would be worthy only of a ſlave, and diſgraceful to a freeman. I anſwer, that the condition and eſſence of rational freedom is, not that the ſubject probably will not be abuſed, but that no man in the State ſhall be clothed with any diſcretionary power, under the colour and pretext of which he can dare to abuſe him. As to probability, I anſwer, that in the mind of man there is no more inſtigating temptation to the moſt remorſeleſs oppreſſion, than the rancour and malice of irritated pride and wounded vanity. —To the argument of improbability I anſwer, the very fact, the very queſtion in debate, nor to ſuch anſwer can I ſee the poſſibility of any reply, ſave that the proſecutors are ſo heartily ſick of the point of view into which they have put themſelves by their proſecution, that they are not likely again to make a ſimilar experiment. But when I ſee any man fearleſs of power, becauſe it poſſibly, or probably, may not be exerciſed upon him, I am aſtoniſhed at his fortitude; I am aſtoniſhed at the tranquil courage of any man who can quietly ſee that a loaded cannon is brought to bear upon him, and that a fool is ſitting at its touch-hole with a lighted match in his hand. And yet, my Lords, upon a little reflection, what is it, after what we have ſeen, that ſhould ſurprize us, however it may ſhock us?—What have the laſt ten years of the world been employed in, but in deſtroying the land-marks of rights, and duties, and obligations; in ſubſtituting ſounds in the place of ſenſe; in ſubſtituting a vile and canting methodiſm in the place of ſocial duty and practical honour; in ſuffering virtue to evaporate into phraſe, and morality into hypocriſy and affectation?—We talk of the violations of Hamburgh or of Baden; we talk of the deſpotical and remorſeleſs barbarian who tramples on the common privileges of the human being; who, in defiance of the moſt known and ſacred rights, iſſues the brutal mandate of uſurped authority; who brings his victim by force within the limits of a juriſdiction to which he never owed obedience, and there butchers him for a conſtructive offence. Does it not ſeem as if it was a conteſt whether we ſhould be more ſcurrilous in invective, or more atrocious in imitation? Into what a condition muſt we be ſinking, when we have the front to ſelect as the ſubjects of our obloquy, thoſe very crimes which we have flung behind us in the race of profligate rivality!

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My Lords, the learned Counſel for the proſecutors have aſſerted, that this act of the 44th of the King extends to all offences, no matter how long or previouſly to it they may have been committed.—The words are, "That from and "after the firſt of Auguſt, 1804, if any perſon, &c. ſhall "eſcape, &c."—Now, certainly nothing could be more convenient for the purpoſe of the proſecutors than to diſmiſs, as they have done, the words "eſcape and go into," altogether. If thoſe words could have been ſaved from the oſtraciſm of the proſecutors, they muſt have deſignated ſome act of the offenders, upon the happening or doing of which the operation of the ſtatute might commence; but the temporary bar of theſe words they wave by the equity of their own conſtruction, and thereby make it a retroſpective law; and having ſo conſtrued it a manifeſtly *ex poſt facto* law, they tell you it is no ſuch thing, becauſe it creates no new offence, and only makes the offender amenable who was not ſo before. That law profeſſes to take effect only from and after the firſt of Aug. 1804:—Now, for eighteen months before that day, it is clear that Mr. JOHNSON could not be removed by any power exiſting from his country and his dwelling; but the moment the act took effect, it is made to operate upon an alledged offence, committed, if at all, confeſſedly eighteen months before. But another word as to the aſſertion, that it is not *ex poſt facto*, becauſe it creates no new crime, but only makes the party amenable. The force of that argument is preciſely this:—If this act inflicted deportation on the defendant by way of puniſhment after his guilt had been eſtabliſhed by conviction, that would, no doubt, be tyrannical, becauſe *ex poſt facto*; but here he ſuffers the deportation, while the law is bound to ſuppoſe him perfectly innocent; and that only by way of proceſs to make him amenable, not by way of puniſhment: and ſurely he cannot be ſo unreaſonable as not to feel the force of the diſtinction. How naturally, too, we find, ſimilar outrages reſort to ſimilar juſtifications! Such exactly was the defence of the forcible entry into Baden. Had that been a brutal violence committed in perpetration of the murder of the unfortunate victim, perhaps very ſcrupulous moraliſts might find ſomething in it to diſapprove; but his Imperial Majeſty was too delicately tender of the rights of individuals and of nations, to do any act ſo flagrant as that would be, if done in that

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point of view; but his Imperial Majeſty only introduced a clauſe of *ne omittas* into his warrant, whereby the worſhipful Bells and Medlicots that executed it, were authorized to diſregard any ſuppoſed fantaſtical privilege of nations that gave ſanctuary to traitors; and he did that from the pureſt motives; from as diſintereſted a love of juſtice as that of the preſent proſecutors, and not at all in the way of an *ex poſt facto* law, but merely as proceſs to bring him in, and make him amenable to the competent and unqueſtionable juriſdiction of the *bois de Boulogne*.—Such are the wretched ſophiſtries to which men are obliged to have recourſe, when their paſſions have led them to do what no thinking man can regard without horror, what they themſelves cannot look at without ſhame; and for which no legitimate reaſoning can ſuggeſt either juſtification or excuſe. Such are the principles of criminal juſtice, on which the firſt experiment is made in Ireland; but I venture to pledge myſelf to my fellow-ſubjects of Great Britain, that, if the experiment ſucceeds, they ſhall ſoon have the full benefit of that ſucceſs. I venture to promiſe them, they ſhall ſoon have their full meaſure of this ſalutary ſyſtem for making men "amenable," heaped and running over into their boſoms.

There now remains, my Lords, one, and only one topic of this odious ſubject, to call for obſervation. The offence here appears by the return and the affidavits to be a libel upon the Iriſh Government, publiſhed by conſtruction in Weſtminſter. Of the conſtructive commiſſion of a crime in one place by an agent, who, perhaps, at the moment of the act, is in another hemiſphere, you have already heard enough:—Here, therefore, we will conſider it ſimply as an alledged libel upon the Iriſh Government; and whether, as ſuch, it is a charge coming within the meaning of the ſtatute, and for which a common Juſtice of Peace in one kingdom is empowered to grant a warrant for conveying the perſon accuſed for trial into the other. Your Lordſhips will obſerve, that in the whole catalogue of crimes for which a Juſtice of Peace may grant a warrant, there is not one that impoſes upon him the neceſſity of deciding upon any matter of law, involving the ſmalleſt doubt or difficulty whatſoever. In treaſon, the overt act; in felony, whether capital or not, the act; in miſdemeanors, the ſimple act.

The dulleſt Juſtice can underſtand what is a breach of the peace, and can deſcribe it in his warrant. It is no more than the deſcription of a fact which the informer has ſeen and ſworn to. But no libel comes within ſuch a claſs, for it is decided over and over, that a libel is no breach of the peace, and upon that ground it was that Mr. Wilkes, in 1763, was allowed the privilege of Parliament, which privilege does not extend to any breach of the peace.

See then, my Lords, what a taſk is impoſed upon a Juſtice of the Peace, if he is to grant ſuch a warrant upon ſuch a charge; he no doubt may eaſily comprehend the allegation of the informer as to the fact of writing the ſuppoſed libel; in deciding whether the facts ſworn amounted to a publication or not, I ſhould have great apprehenſion of his fallibility; but if he got over thoſe difficulties I ſhould much fear for his competency to decide what given facts would amount to a conſtructive publication.—But even if he did ſolve that queſtion, a point on which, if I were a Juſtice, I ſhould acknowledge myſelf moſt profoundly ignorant, he would then have to proceed to a labour in which I believe no man could expect him to ſucceed: that is, how far the paper ſworn to was, in point of legal conſtruction, libellous or not. I truſt, this Court will never be prevailed upon to ſanction, by its deciſion, a conſtruction that would give to ſuch a ſet of men a power ſo incompatible with every privilege of liberty, or of law. To ſay it would give an irreſiſtible power of deſtroying the Liberty of the Preſs in Ireland would, I am aware, be but a ſilly argument where ſuch a thing has long ceaſed to exiſt. But I have for that very reaſon a double intereſt now, as a ſubject of the empire, in that noble guardian of liberty in the ſiſter nation. When my own lamp is broken, I have a double intereſt in the preſervation of my neighbours. But if every man in England who dares to obſerve, no matter how honeſtly and juſtly, upon the conduct of Iriſh miniſters, is liable to be torn from his family, and dragged hither by an Iriſh bailiff, for a conſtructive libel againſt the Iriſh government, and upon the authority of an Iriſh warrant; no man can be ſuch a fool as not to ſee the conſequence. The inevitable conſequence is this: that at this awful criſis, when the weal, not of this empire only, but of the whole civilized world, depends on the ſteady faith and the conſolidated efforts of

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theſe two countries—when Ireland is become the right arm of England—when every thing that draws the common intereſt and affection cloſer gives the hope of life—when every thing that has even a tendency to relax that ſentiment is a ſymptom of death,—even at ſuch a criſis may the raſhneſs or folly of thoſe intruſted with its management ſo act as to deſtroy its internal proſperity and repoſe, and lead it into the twofold, fatal error, of miſtaking its natural enemies for its friends, and its natural friends for its natural enemies; without any man being found ſo romantically daring as to give notice of the approaching deſtruction.

My Lords, I ſuppoſe the learned Counſel will do here what they have done in the other Court: they will aſſert, that this libel is not triable here; and they will argue, that ſo falſe and heinous a production ſurely ought to be triable ſomewhere. As to the firſt poſition, I ſay the law is directly againſt them. From a very early ſtage of the diſcuſſion, the gentlemen for the proſecution thought it wiſe for their clients to take a range into the facts much more at large than they appeared on the return to the writ, or even were by the affidavits that have been made; and they have done this to take the opportunity of aggravating the guilt of the defendant, and at the ſame time of panegyriſing their clients; they have therefore not argued upon the libel generally as a libel, but they thought it prudent to appear perfectly acquainted with the charges which it contains:—they have therefore aſſumed, that it relates to the tranſactions of the 23d July, 1803, and that the guilt of the defendant was, that he wrote that libel in Ireland, which was afterwards publiſhed in England; not by himſelf, but by ſome other perſons. Now, on theſe facts, nothing can be clearer than that he is triable here. If it be a libel, and if he wrote it here, and it was publiſhed in England, moſt manifeſtly there muſt have been a precedent publication, not merely by conſtruction of law in Ireland, but a publication by actual fact; and for this plain reaſon, if you for a moment ſuppoſe the libel in his poſſeſſion (and if he did in fact write it, I can ſcarcely conceive that it was not, unleſs he wrote it perhaps by conſtruction), there was no phyſical means of tranſmitting it to England that would not amount to a publication here; becauſe, if he put it into the poſt-office, or gave it to a meſſenger to carry thither, that

would be complete evidence of publication againſt him: ſo would the mere poſſeſſion of the paper, in the hands of the witneſs who appeared and produced it, be perfect evidence, if not accounted for or contradicted, to charge him with the publication; ſo that really I am ſurpriſed how gentlemen could be betrayed into poſitions ſo utterly without foundation. They would have done juſt as uſefully for their clients, if they had admitted what every man knows to be the fact: that is, that they durſt not bring the charge before an Iriſh Jury. The facts of that period were too well underſtood. The Iriſh public might have looked at ſuch a proſecution with the moſt incredulous deteſtation; and if they had been ſo indiſcreet as to run the riſk of coming before an Iriſh Jury, inſtead of refuting the charges againſt them as a calumny, they would have expoſed themſelves to the peril of eſtabliſhing the accuſation, and of raiſing the character of the man whom they had the heart to deſtroy, becauſe he had dared to cenſure them. Let not the learned gentlemen, I pray, ſuppoſe me ſo ungracious as to ſay, that this publication, which has given ſo much pain to their clients, is actually true; I cannot perſonally know it to be ſo, nor do I ſay ſo, nor is this the place or the occaſion to ſay that it is ſo. I mean only to ſpeak poſitively to the queſtion before you, which is matter of law. But as the gentlemen themſelves thought it meet to pronounce an eulogy on their clients, I thought it rather unſeemly not to ſhew that I attended to them; I have moſt reſpectfully done ſo; I do not contradict any praiſe of their virtues or their wiſdom, and I only wiſh to add my very humble commendation of their prudence and diſcretion, in not bringing the trial of the preſent libel before a Jury of this Country.

The learned Counſel have not been contented with abuſing this libel as a production perfectly known to them; but they have wandered into the regions of fancy. No doubt the other Judges, to whom thoſe pathetic flights of forenſic ſenſibility were addreſſed, muſt have been ſtrongly affected by them. The learned gentlemen have ſuppoſed a variety of poſſible caſes. They have ſuppoſed caſes of the foulеſt calumniators aſperſing the moſt virtuous miniſters. Whether ſuch ſuppoſed caſes have been ſuggeſted by fancy, or by fact, it is not for me to decide; but I beg leave to

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ſay, that it is as allowable to us as to them to put caſes of ſuppoſition —

——— Cur ego ſi fingere pauca,
Poſſum invidear?

Let me then, my Lords, put an imaginary caſe of a different kind:—Let me ſuppoſe, that a great perſonage, intruſted with the ſafety of the citadel (meaning and wiſhing perhaps well, but miſled by thoſe lackered vermin that ſwarm in every great hall), leaves it ſo looſely guarded, that nothing but the gracious interpoſition of Providence has ſaved it from the enemy. Let me ſuppoſe another great perſonage going out of his natural department, and, under the ſuppoſed authority of high ſtation, diſſeminating ſuch doctrines as tend to root up the foundation of ſociety—to deſtroy all confidence between man and man—and to impreſs the great body of the people with a deluſive and deſperate opinion, that their religion could diſſolve or condemn the ſacred obligations that bind them to their country—that their rulers have no reliance upon their faith, and are reſolved to ſhut the gates of mercy againſt them.

Suppoſe a good and virtuous man ſaw, that ſuch doctrines muſt neceſſarily torture the nation into ſuch madneſs and deſpair, as to render them unfit for any ſyſtem of mild or moderate government; that, if on one ſide, bigotry or folly ſhall inject their veins with fire, ſuch a fever muſt be kindled as can be allayed only by keeping a ſtream of blood perpetually running from the other, and that the horrors of martial law muſt become the direful but inevitable conſequence. In ſuch a caſe, let me aſk, what would be his indiſpenſible duty?—it would be, to avert ſuch dreadful dangers, by expoſing the conduct of ſuch perſons; by holding up the folly of ſuch bigotted and blind enthuſiaſm to condign deriſion and contempt; and painfully would he feel, that on ſuch an occaſion he muſt diſmiſs all forms and ceremonies; and that to do his duty with effect he muſt do do it without mercy. He ſhould alſo foreſee, that a perſon ſo acting, when he returned to thoſe to whom he was reſponſible, would endeavour to juſtify himſelf by defaming the country which he had abuſed—for calumny is the natural defence of the oppreſſor: he ſhould, therefore, ſo reduce his perſonal credit to its juſt ſtandard, that his aſſertions

tions might find no more belief than they deſerved. Were ſuch a perſon to be looked at as a mere private individual, charity and good-nature might ſuggeſt not a little in his excuſe. An inexperienced man, new to the world, and in the honey-moon of preferment, would run no ſmall riſk of having his head turned in Ireland. The people of our iſland are by nature penetrating, ſagacious, artful, and comic—'*natio comæda eſt.*' In no country under heaven would an aſs be more likely to be hood-winked, by having his ears drawn over his eyes, and to acquire that fantaſtical alacrity that makes dullneſs diſpoſable to the purpoſes of humourous malice, or intereſted impoſture. In Ireland, a new great man could get the freedom of a ſcience as eaſily as of a corporation, and become a doctor, by conſtruction, of the whole Encyclopædia; and great allowance might be made under ſuch circumſtances for indiſcretions and miſtakes, as long as they related only to himſelf; but the moment they become public miſchiefs they loſe all pretenſions to excuſe—the very ambition of incapacity is a crime not to be forgiven; and however painful it may be to inflict, it muſt be remembered, that mercy to the delinquent would be treaſon to the public.

I can the more eaſily underſtand the painfulneſs of the conflict between charity and duty, becauſe at this moment I am labouring under it myſelf; and I feel it the more acutely, becauſe I am confident, that the paroxyſms of paſſion that have produced theſe public diſcuſſions have been bitterly repented of. I think, alſo, that I ſhould not act fairly if I did not acquit my learned opponents of all ſhare whatſoever in this proſecution—they have too much good ſenſe to have adviſed it; on the contrary, I can eaſily ſuppoſe, Mr. Attorney General ſent for to give counſel and comfort to his patient; and after hearing no very conciſe detail of his griefs, his reſentments and his miſgivings, methinks I hear the anſwer that he gives, after a pauſe of ſympathy and reflection:—"No, ſir, don't proceed in ſuch a buſineſs; you'll only expoſe yourſelf to ſcorn in one country, and to deteſtation in the other. You know you durſt not try him here, where the whole kingdom would be his witneſs. If you ſhould attempt to try him there, where he can have no witneſſes, you will have both countries upon your

your back. An Engliſh Jury would never find him guilty. You will only confirm the charge againſt yourſelf; and be the victim of an impotent, abortive malice. If you ſhould have any ulterior project againſt him, you will defeat that alſo; for thoſe that might otherwiſe concur in the deſign, will be ſhocked and aſhamed of the violence and folly of ſuch a tyrannical proceeding, and will make a merit of protecting him, and of leaving you in the lurch.—What you ſay of your own feelings, I can eaſily conceive.—You think you have been much expoſed by thoſe letters; but then remember, my dear ſir, that no man can claim the privilege of being made ridiculous or hateful by no publications but his own. Vindictive critics have their rights, as well as bad authors. The thing is bad enough at beſt; but, if you go on, you will make it worſe—it will be conſidered an attempt to degrade the Iriſh Bench and the Iriſh Bar—you are not aware what a neſt of hornets you are diſturbing.—One inevitable conſequence you don't foreſee—you will certainly create the very thing in Ireland, that you are ſo afraid of, a News-paper;—think of that, and keep yourſelf quiet.—And, in the mean time, conſole yourſelf with reflecting, that no man is laughed at for a long time;—every day will produce ſome new ridicule that muſt ſuperſede him."——Such, I am ſatisfied, was the counſel given; but I have no apprehenſion for my client, becauſe it was not taken. Even if it ſhould be his fate to be ſurrendered to his keepers—to be torn from his family—to have his obſequies performed by torch-light—to be carried to a foreign land, and to a ſtrange tribunal, where no witneſs can atteſt his innocence, where no voice that he ever heard can be raiſed in his defence, where he muſt ſtand mute, not of his own malice, but the malice of his enemies—yes, even ſo, I ſee nothing for him to fear—that all-gracious Being that ſhields the feeble from the oppreſſor, will fill his heart with hope, and confidence, and courage; his ſufferings will be his armour, and his weakneſs will be his ſtrength; he will find himſelf in the hands of a brave, a juſt, and a generous nation—he will find that the bright examples of her Ruſſels and her Sidneys have not been loſt to her children; they will behold him with ſympathy and reſpect, and his perſecutors with ſhame and abhorrence; they will feel, too, that what is then his ſituation, may to-morrow be their own—but their firſt tear will be ſhed

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for him, and the ſecond only for themſelves—their hearts will melt in his acquittal; they will convey him kindly and fondly to their ſhore; and he will return triumphant to his country; to the threſhold of his ſacred home, and to the weeping welcome of his delighted family; he will find that the darkneſs of a dreary and a lingering night hath at length paſſed away, and that joy cometh in the morning.—No, my Lords, I have no fear for the ultimate ſafety of my client. Even in theſe very acts of brutal violence that have been committed againſt him, do I hail the flattering hope of final advantage to him—and, not only of final advantage to him, but of better days and more proſperous fortune for this afflicted country—that country of which I have ſo often abandoned all hope, and which I have been ſo often determined to quit for ever.

Sepe vale dicto multa ſum deinde locutus,
Et quæſi diſcedens oſcula ſumma dabam,
Indulgens animo, pes tardus erat.

But I am reclaimed from that infidel deſpair—I am ſatisfied that while a man is ſuffered to live, it is an intimation from Providence that he has ſome duty to diſcharge, which it is mean and criminal to decline; had I been guilty of that ignominious flight, and gone to pine in the obſcurity of ſome diſtant retreat, even in that grave I ſhould have been haunted by thoſe paſſions by which my life had been agitated—

Quæ cura vivos eadem ſequitur tellure repoſtos.

And, if the tranſactions of this day had reached me, I feel how, my heart would have been agonized by the ſhame of the deſertion; nor would my ſufferings have been mitigated by a ſenſe of the feebleneſs of that aid, or the ſmallneſs of that ſervice, which I could render or withdraw. They would have been aggravated by the conſciouſneſs that, however feeble or worthleſs they were, I ſhould not have dared to thieve them from my country.—I have repented—I have ſtaid—and I am at once rebuked and rewarded by the happier hopes that I now entertain.—In the anxious ſympathy of the Public—in the anxious ſympathy of my learned Brethren, do I catch the happy preſage of a brighter fate for Ireland. They ſee, that, within theſe ſacred walls, the cauſe of Liberty and of Man may be pleaded with boldneſs,

boldneſs and heard with favour. I am ſatisfied they will never forget the great truſt, of which they alone are now the remaining depoſitaries. While they continue to cultivate a ſound and literate philoſophy—a mild and tolerating chriſtianity—and to make both the ſources of a juſt and liberal, and conſtitutional juriſprudence: I ſee every thing for us to hope; into their hands, therefore, with the moſt affectionate confidence in their virtue, do I commit theſe precious hopes. Even I may live long enough yet to ſee the approaching completion, if not the perfect accompliſhment, of them. Pleaſed ſhall I then reſign the ſcene to fitter actors—pleaſed ſhall I lay down my wearied head to reſt, and ſay, "Lord, now letteſt thou thy ſervant depart in peace, according to thy word, for mine eyes have ſeen thy ſalvation."

Mr. William Johnson.*

My Lords,

As the Counſel for the Crown will be entitled to the reply, I ſhould be precluded from any opportunity of addreſſing the Court upon this ſubject, if I did not offer myſelf at this moment to its conſideration. I feel that I have more than a common claim to be heard on this occaſion. Certainly no man ever acted under the impulſe of a more imperious duty, or had a more afflicting taſk to perform. In what I ſhall ſay, however, to the Court, I ſhall confine myſelf to a diſcuſſion of the legal queſtions now before it; and will endeavour not to entertain a thought, or utter an expreſſion, connected with my own perſonal feelings.

Your Lordſhips will determine the queſtion now before you upon the conſtruction of this act, not from any opinion of what it ought to extend to; but from what, according to the eſtabliſhed rules of interpretation, it does extend to. Even if it ſhould be your opinion, that it would have been matter of prudent regulation, that the proviſions of this act ſhould embrace the preſent caſe; you will yet, if I ſhew you that it is, at all events, a *caſus omiſſus*, leave it as the act has done. You will be the more inclined to do ſo, if in the courſe of my obſervations I ſhould ſhew you,

 that

* This report contains the ſubſtance of Mr. Johnson's arguments both in the King's Bench and Exchequer.

that to extend this act to the case now before you, would be to subvert the most acknowledged principles of justice, and the admitted common law rights of the meanest individual in society. You will not legislate; and particularly you will not do so to have your share in the common destruction of law and liberty. In the interpretation of a Statute, levelling by the construction contended for the antient bulwarks of our Constitution, you will go for such a purpose as little way as possible. If I shew you, that from the whole view of this act, the committing a crime by *actual* presence, and *escaping or removing after such commission* were alone in the contemplation of this Legislature, and that the *title*, *recitals*, and *provisions* of this act regard these alone, you will not extend it to cases of the constructive commission of offences, neither within the title of this act, the recited mischief or remedy provided by it.

The application now before the Court on the part of the Defendant, is to be discharged from an illegal arrest. It depends upon a recent Act of Parliament, upon the construction of which you have no judicial decisions. The return to the Habeas Corpus which has been sued out by the Defendant, states a Warrant of the Chief Justice of England, grounded on an indictment found at Middlesex against the Defendant, for the publication of a Libel. This Warrant has been endorsed by an Irish Justice of the Peace, under a *presumed* authority, given by the 44th of the present King, chap. 92. Under this endorsement the Defendant has been arrested; and it now appears, by uncontroverted documents before the Court, that the gentleman applying for his discharge has been a continuing resident of this part of the United Kingdom, from a period before which it is absolutely impossible that the offence, with which he stands charged, could have been committed; and within which, he could not *himself* have done any act in England, criminal or otherwise; or within such period have removed therefrom. The question, therefore, will be, whether under all these circumstances appearing, as well upon the part of the return itself, as on the *uncontradicted* affidavits made on the part of the Defendant, this Warrant of Lord Ellenborough, so endorsed, is a sufficient authority under which to arrest and hold the present Defendant.

Your

Your Lordſhips muſt obſerve, that the only power you can exerciſe in this caſe is to diſcharge. You muſt either not intermeddle at all, or intermeddle to this extent. If the arreſt be legal, though only on proceſs, and for a miſdemeanor, *your authority* is at an end. There have been times when ſuch a propoſition would have ſtartled the conſtitutional feelings of a Judge of the land. Whether it be right, that ſuch times ſhould have paſſed away, is not for me to argue. Such is the preſent law; but whether it extends to the caſe before you—that is, to the caſe of an offence bailable of common right, is *one* of the queſtions on which I mean to trouble you.

Some crude and indigeſted opinions have been thrown out in the courſe of this diſcuſſion as if this Court could take bail in a caſe circumſtanced like the preſent: it may, therefore, be neceſſary to examine this matter a little upon principle:—The preſent Act embraces the three countries, England, Ireland, and Scotland. The legal Juriſdictions of theſe countries are perfectly diſtinct; and in legal contemplation ſo are their Laws. The principle of diſtinctneſs is as ſtrong between the Laws of England and Ireland, as between the Laws of Scotland and either of the other countries; though the diſtinctneſs in point of fact may not be ſo great. Let us ſuppoſe then, for the ſake of argument, that the Warrant in this caſe had been iſſued in Scotland, for in ſound reaſoning it will make no difference, though it may ſtrike common apprehenſion more: is there any tribunal in this country can determine whether the Warrant be or be not conformable to the Law of that country. For inſtance, what tribunal in this country has *judicial* knowledge of the crimes of *hamſoken* and *forning*; yet theſe are capital offences by the Law of Scotland. A tribunal which has not knowledge of the Law can have none of the *offence*, and therefore cannot act upon it. In Wilkes's Caſe, my Lord Camden lays it down, that it is ſufficient if the offence appear in the warrant on which a party is arreſted; becauſe THAT is the guide to the Magiſtrate in taking or refuſing bail. This is ſufficient upon principle; and I will not trouble the Court upon the practical abſurdity which would follow, from any attempt to take bail in this country for offences committed in England or Scotland. They will ſhortly appear from a few ſimple

queſtions:—To whom is the recognizance to be returned? Of what Court can it be made a record? By what proceſs is the return of it to be enforced? If forfeited, where is it to be eſtreated; and if eſtreated, how to be levied?

Enough has been ſaid, and much more might be ſaid, to ſhew, that as the law now ſtands, this Court, much leſs any inferior tribunal, cannot take bail for offences alledged to be committed in England or Scotland. I uſe this argument merely as an argument of conſtruction; and to ſhew, that if you can avoid it you will not give this act a conſtruction which would militate with the common law right of the ſubject—that is, of being bailed for a bailable offence *within* the *juriſdiction* where the arreſt is made. If this act ſhould be ſo conſtrued, I will venture to ſay, it will ſtand a ſingle and awful exception in the hiſtory of Engliſh legiſlation. It muſt, therefore, be your anxious deſire, if the eſtabliſhed rules of conſtruction will allow you, to confine the operation of this act to offences not bailable; no miſchief will then ariſe: for to ſuch offenders it can make no difference, whether the juriſdiction within which they are arreſted have or have not an authority to bail. Let us examine this matter a little more minutely:—

If this Act of Parliament extend to one miſdemeanor it extends to all. I throw out of the preſent diſcuſſion all conſideration of the particular quality of the miſdemeanor charged upon the preſent defendant. Your Lordſhips have nothing to do with any ſuppoſed intent which the perſons who brought in this bill, at this *particular time*, might have had. You will not trouble yourſelves with the conſideration, whether any hope was entertained, either by an adoption of the letter of certain expreſſions, or by any ingenious interpretation of doubtful and ambiguous paſſages, of bringing within this act any particular caſe, excluded by its general ſpirit and policy and the ſettled principles of law: with ſuch conſiderations you will have nothing to do. You ſit here to aſcertain the meaning of the Legiſlature, and to arrive at it through the known maxims of law, and the eſtabliſhed rules of conſtruction.

I ſhall endeavour to ſhew, in the firſt place, that you ought not to extend this act to bailable offences; becauſe

you

you would thereby repeal the Habeas Corpus act, and take away by conſtruction the common law right of every ſubject in the realm: and ſecondly, that though you ſhould feel yourſelves bound to do ſo, you will yet be of opinion, that this act can relate only to offences committed by *actual preſence* in that part of Great Britain or Ireland in which the offence is charged to have been done, and conſequent eſcape or removal; and that it would be pregnant with the utmoſt abſurdity, and effect the moſt unheard of ſoleciſm in Legiſlation, to extend it to caſes where the perſon charged reſided out of that part of the United Kingdom in which he is charged at the time of the commiſſion of the alledged offence—in other words, that avoidance of juſtice, by *removal* from the place where the act is done which is charged to be an offence, is an indiſpenſable requiſite to give operation to this law.

Before I particularly examine the firſt head of this argument, permit me to take notice of an obſervation made by your Lordſhip in another place:—Your Lordſhip ſaid, and truly, that before the paſſing of the act now before you, perſons charged with capital offences might be arreſted and tranſmitted from one kingdom to the other for trial in the place where their crime was alledged to have been perpetrated; and that a ſpecial ſaving and proviſion in the Engliſh Habeas Corpus act recogniſes this proceeding, and provides, that it may thereafter take place, as it had done before. Your Lordſhip then ſaid, that it is recited by the preſent act, that there exiſted no *ſufficient* proviſion in the law of either countries for the arreſt and tranſmiſſion of offenders; and your objection is, that this recital cannot be accounted for, unleſs this act be extended beyond capital caſes, for that the law had already provided for ſuch caſes. In my humble judgement, this objection may receive a complete anſwer. The words refered to in the preſent act are, "That there was no *ſufficient* proviſion for the tranſmiſſion "of ſuch offenders." This expreſſion admits there was ſome exiſting proviſion of the kind alluded to. Let us ſee what it was:—

By the ſtatute of Weſtminſter the firſt, commitments *per ſpeciale mandatum domini regis* were declared irrepleviſable. By the equity of the ſtatute this was in time extended to commitments

ments by order of the Privy Council, where it was ſuppoſed the King preſided. At length, in point of practice, this authority came to be exerciſed by the Secretary of State; not by any authority of his as Secretary of State, but as being, conſtructively a commitment *per ſpeciale mandatum domini regis*. You will ſee this hiſtory of the authority of the Secretary of State to commit, ſtated by my Lord Camden, in his famous argument given in the judgment he pronounced in the caſe, Entick, *v.* Carrington and others, reported in the 11th volume of the ſtate trials, Mr. Hargrave's edition. Under the exerciſe of this authority it was, that perſons in England, charged with capital felonies done abroad, were arreſted and tranſmitted to the ſcene of their guilt to receive trial. Applied to the caſes of ſuch offenders, the foundation of ſuch an authority were not likely to be very critically examined. Independent of the recognition of it by the proviſion alluded to in the act of Habeas Corpus, there is little in ſuch a proceeding to ſatisfy the feelings of a conſtitutional lawyer: not that any man could object to the end for which, in the inſtances under conſideration, it was exerciſed. The heart and mind of every man accedes ſpontaneouſly to the act, by which the traitor, murderer, or felon, is brought *back* to the ſcene of his guilt, to receive the puniſhment due to his crime; and the exerciſe of a vigour beyond the law would be long ſubmitted to when applied to ſuch offenders. The proviſion in the Engliſh Habeas Corpus Act has, however, given a ſanction to what might have well been queſtioned before; and I admit, that ſince that time, the authority ſo exerciſed could not be queſtioned.

It was, however, extremely defective. There was but one tribunal that could act, and that fixed to a particular place, and not open to the ſubject, *ex debito juſtitiæ*. From the nature of it, it muſt have been difficult to put in motion, and almoſt ineffectual to prevent further eſcape upon the moment of diſcovery. Flowing merely from the prerogative, and to be exerciſed only at diſcretion, the protection of the Crown would, in all ſuch caſes be ſufficient againſt the aggrieved ſubject. The reſervoirs of juſtice ſhould, if I may uſe the expreſſion, be always open, and ſcattered through the land. This was to be found only in one corner of the kingdom, and was under the key of whatever individual was the miniſter of the day. He could not be compelled to

act

act by any of the ordinary exiſting authorities in the realm; and when he did, it was a kind of phenomenon in a regulated government like ours, to ſee the Secretary of State doing the duty of a Juſtice of the Peace, and a King's Meſſenger ſubſtituted in the place of the Conſtable. Upon the whole, it was a juriſdiction neither fixed in its principles, certain in its operation, nor open at all times to the ſubjects of the realm; and it was of a kind utterly anomalous in the conſtitution.

The difficulties ariſing from this undefined and irregular authority in the arreſt and tranſmiſſion of traitors and felons from one kingdom to another, had been long felt and often complained of, and well deſerved to be removed by ſtatutable proviſion—ſuch proviſion had been as neceſſary for centuries as now, but evils have frequently a long reign before legiſlative remedies are applied. The ſtate of things, therefore, as I have here detailed them, fully accounts for the recital, that "there was no *ſufficient* proviſion for the arreſt and tranſmiſſion of offenders," even ſuppoſing the act confined to caſes not bailable of right.

Let us now ſee, if the terms made uſe of in this act give any additional force to the opinion, that it ought to be confined to the *majora crimina*. The miſchief recited in the ſection now under conſideration is, "The *eſcape* of *felons* and *other malefactors* from one kingdom to another, whereby their offences *frequently* remain unpuniſhed."—It may not be immaterial juſt to remark here, that if it had been intended to include perſons guilty of mere miſdemeanors in this deſcription, the recital, *as to them*, "ought to have been, that by eſcape from one kingdom to another their offences *always* remained unpuniſhed," unleſs a voluntary deſertion of their country were conſidered, (as perhaps in a municipal view it ought to be) as a ſufficient puniſhment for any offence of that nature of which they could be guilty—In truth, the phraſe *felons and malefactors*, uſed by the Legiſlature, gives conſiderable colour to the inference I am endeavouring to draw. I admit, from the words felons and *other* malefactors, you muſt underſtand felons, and malefactors *other* than felons.—Still I think it reaſonable to ſuppoſe, that the Legiſlature intended felonies and *other crimes* of the ſame ſtamp; or, in other words, the *majora crimina*;

crimina; ſuch as are not bailable by the ordinary authorities. Many ſuch crimes, not felonies, may be found by a ſlight examination of the criminal code of England.

But there exiſted a ſtill further neceſſity for the uſe of ſome term beſide felons. The act relates not only to England, but to Scotland. The word felons would not anſwer for this purpoſe; it is not deſcriptive, as I believe, of any claſs of offenders in the Scottiſh law. The word malefactors, therefore, being free from the rigid interpretation which a term, merely technical, muſt always receive, and being, in ordinary ſpeech, deſcriptive of the higher claſſes of offenders, was uſed to take in ſuch of this deſcription in England as the word felons would not extend to, and to include all offenders in Scotland of a like kind. If the word *malefactors* had been uſed for the purpoſe of including offenders of every deſcription, the introduction of the word *felons* was not only uſeleſs, but productive of confuſion and uncertainty in a deſcription, which, without it, would be perfectly clear.

But this will appear more manifeſt from a ſhort review of the different acts heretofore paſſed in England on this ſubject, and comparing them, as far as is neceſſary for this part of the queſtion, with the act now before you. The acts I allude to are the 23d of George II. c. 26. ſ. 11. the 24th of Geo. II. c. 55. ſ. 1. and the 13th of George III. c. 31. The two firſt acts relate to the arreſt and tranſmiſſion of offenders from county to county within England, and the laſt to the arreſt and tranſmiſſion of felons and other malefactors from England to Scotland, and *vice verſa*. The preſent act is, in truth, compounded, *mutatis mutandis*, of theſe ſeveral acts.—It is contended on the other ſide, that the miſchief recited by thoſe acts, and the remedy provided for that miſchief, between kingdom and kingdom, and county and county, are exactly commenſurate—that is, that they equally extend to *all* offenders:—now, it is remarkable, that in the 23d of Geo. II. and the 24th of Geo. II. and the firſt part of the preſent act, all of which relate to arreſt and tranſmiſſion between county and county, within the ſame kingdom, *one uniform preamble* is adopted of the deſcription of perſons within the purview of theſe acts, viz. *all* perſons againſt whom a *warrant* ſhall be iſſued

—but,

—but, in the acts which relate to arreſt and tranſmiſſion from kingdom to kingdom, the Legiſlature, *expreſsly rejecting* the preamble which was before them in the acts relating to county and county, adopt a new and different preambles in the act of 1773, *i. e.* ch. 13th Geo. III. and, inſtead of the words, "all perſons againſt whom a warrant ſhall be iſſued," the deſcription is "felons and other malefactors, making their eſcape, &c."—This diſtinction in the deſcription of the perſons intended to be affected by thoſe acts reſpectively is ſtudiouſly preſerved in the act now before you, and remarkably preſerved, becauſe this one act includes and embodies the proviſions of all the reſt; and if the conſtruction now inſiſted on by the Counſel for the Crown be the true one, the deſcription "all perſons againſt whom a warrant ſhall have been iſſued," would have been the true deſcription to have adopted in the preamble, not only to the regulations relating to county and county within the ſame kingdom, but to the regulations for the arreſt and tranſmiſſion of offenders between kingdom and kingdom. Does this variance of language in the ſame inſtrument induce no variance of conſtruction; and can we ſuppoſe the Legiſlature uſed it for the mere purpoſe of perplexing what would be plain and explicit without it?

It follows from what I have ſaid, that if you extend the operation of this act to offences not bailable, or, in other words, to miſdemeanors of every deſcription, you, in effect, repeal the Habeas Corpus acts of both countries. It would have been a ſtrong meaſure in the Legiſlature to have repealed thoſe acts even by expreſs words, but I will venture to ſay, it would be a ſtill bolder meaſure in any Court of Juſtice to do ſo, by the conſtruction of a law, which, by the ordinary rules of conſtruction, *may be* conſtrued otherwiſe.

I have ſtated it to be the common law right of every ſubject of this realm to be bailed for a bailable offence, (if he tender ſufficient bail) *on the ſpot* where he is arreſted. The act before you ſtudiouſly provides for this, in caſe of arreſt in one county for an offence committed in another; the party muſt be bailed on the ſpot where he is arreſted. Yet it is contended, that if the warrant has iſſued in Great Britain for the *pettieſt offence* known to the law, the individual ar-

 reſted

reſted may be carried from the remoteſt corner of this part of the United Kingdom to England or Scotland, as the caſe may be, to look for bail, not where his connexions live, not where he is known, but in a place where perhaps he has never ſet his foot, nor his name been heard of, nor even his language underſtood. Can the mighty power of a ſtate be called into act to work ſo foul a wrong as this, and in a caſe ſo diſproportionate to its efforts, and ſo far beneath its care? If the conſtruction now contended for be true with reſpect to this country, it muſt be equally true with reſpect to England and Scotland. There is a proviſion in the Habeas Corpus act of England, "that no inhabitant of England ſhould be ſent priſoner into *Ireland*, &c. and every ſuch impriſonment is adjudged illegal, an action of falſe impriſonment is given to the party aggrieved, and the penalties of a premunire denounced againſt the offender, and he is rendered incapable of a pardon from the Crown"—31ſt Charles II. c. 2. ſ. 12. This ſecurity to the ſubject againſt the ſtrong hand of power, by *whomſoever* exerciſed, is confined to caſes either where no offence is alledged againſt the party ſo taken and impriſoned, or where he is charged with an offence *not capital*. It of courſe excludes the poſſibility, if it be not repealed by the preſent law, of arreſting and tranſmitting an inhabitant of England to this country for any alledged miſdemeanor; but the conſtruction now contended for renders its proviſion abſolutely nugatory, and the proudeſt ſubject in England may be ſent here, without the poſſibility of bail in England, upon the moſt groundleſs and wanton accuſation that malice ever framed, and for the loweſt and moſt trivial offence known in the criminal code.

I have ſaid thus much to ſhew, that you ought not to extend this law by conſtruction to caſes bailable of common right, becauſe by doing ſo, you would impute to the Legiſlature as foul a wrong as could be worked in a country having any pretenſions to a free conſtitution. On this head of argument, however, I will not trouble the Court further. It is my intention to argue this queſtion with the moſt perfect candour, and I have no heſitation in declaring, that this is not the part of the caſe on which I mean confidently to reſt the cauſe of my client.

I proceed

I proceed, therefore, to the ſecond head of the argument:

My poſition is, that this act is confined to perſons who having by *actual* preſence committed an offence in a particular juriſdiction, avoid by *removal* after the offence committed, *out of that juriſdiction*, the ready proceſs of the law iſſuing *within it*, whereby, in the words of the act, "their *offences* often remain unpuniſhed."—I ſhall be content to depart from this Hall a proſcribed driveller, if, upon this part of the caſe, I leave the ſmalleſt doubt upon any *unprejudiced* legal mind. The act of the 44th of the King, upon which the preſent queſtion ariſes, is founded upon three previous acts, paſſed in England in *pari materia*, and, if I may ſo ſpeak, embodies them all. The title correſponds with this origin, and beſpeaks directly its parentage. It is "An act to render more eaſy the apprehending and bringing to trial offenders *eſcaping* from one part of the United Kingdom to the other, and *alſo* from county to county." Its regulations are internal and external. The proviſions as to the firſt are taken in terms from the 23d and 24th Geo. II. in England, which I have already mentioned, and as to the latter, from the 13th of the preſent King in England. The 11th ſection of the firſt of thoſe acts contains all that relates to the preſent queſtion, and the preamble of that ſection ſtates, that "perſons againſt whom warrants are granted by Juſtices of the Peace for the ſeveral counties within this kingdom, *eſcape* into other counties *out* of the juriſdiction of the Juſtices granting ſuch warrants, and *thereby* avoid being puniſhed for the offences wherewith they are charged;" and it enacts, "that in caſe any perſon againſt whom a legal warrant ſhall be iſſued by any Juſtice or Juſtices of the Peace for any county, &c. to which *ſuch* perſon ſhall have gone or eſcaped, to indorſe ſuch warrant, &c. and to cauſe ſuch perſon to be apprehended, and ſent to the Juſtice or Juſtices granting ſuch warrant, or to ſome other Juſtice or Juſtices of the county, &c. *from whence* ſuch perſon ſhall have *gone or eſcaped*, to be dealt with according to law," &c.

The ſlighteſt peruſal of this clauſe ſhews the deſcription of perſons who were the objects of this law—"perſons againſt whom warrants are granted, *eſcaping*, &c." The iſſuing of a warrant is a *precedent fact*, and the words,

" againſt whom warrants are granted," deſignate and mark out the individuals, who, *coming under this deſcription*, may, *by eſcaping*, become the objects of the law. They muſt be perſons againſt whom a warrant *has* iſſued, and the proviſion in the enacting part is, that " it ſhall and may be lawful for any Juſtice of the Peace of the county, &c. to which *ſuch* perſon ſhall have gone or eſcaped," that is, a perſon againſt whom a warrant *has* iſſued. Thus then the preamble reciting the miſchief, and the clauſe providing the remedy, attach ſolely upon individuals, who " being perſons againſt whom warrants *have* iſſued," ſhall eſcape: that is, the miſchief recited and remedy applied, are expreſsly confined to the *eſcape* of perſons againſt whom warrants *have* iſſued; in other words, to eſcape, *after* warrant iſſued: and in truth, in a legal technical ſenſe, ſuch perſons alone can be *guilty* of an eſcape. Now, aſſuming for a moment, what indeed is pretty clear, that the object of the law was the apprehenſion of perſons committing a breach of the peace by *actual* preſence, it is manifeſt that the proviſions of this act were extremely defective. No perſon quitting the juriſdiction *after* the offence committed, and BEFORE warrant granted could be affected by the proviſions of it, ſo that if the conſcience of the offender took the alarm *before* any proceſs iſſued for his apprehenſion, this law as to him was dead letter.

This imperfection was ſoon felt, for in the very next year, the 24th of Geo. II. c. 55. was paſſed for the expreſs purpoſe of doing it away. Its *only* title is, " An act for amending and making *more effectual* the former act." It recites the entire enacting clauſe of the former act, and then goes on in the following words, " And whereas *ſuch offender or offenders* may reſide and be in ſome other county, &c. *out* of the juriſdiction of the Juſtice or Juſtices granting ſuch warrant as aforeſaid, *before* the granting ſuch warrant, *and* without eſcaping or going out of the county, &c. *after* ſuch warrant granted " Now it is remarkable, that the word offender does not occur in any part of the enacting clauſe of the 11th ſection of the 23d Geo. II. recited in the 24th. To whom then does the word ſuch offender uſed in the preamble of this act, relate? It muſt relate to ſome deſcription of perſon mentioned in the 23d Geo. II. as it follows immediately the recital of that act—

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it manifeſtly refers to the deſcription of perſons about whom alone that act was converſant, that is, perſons eſcaping out of their juriſdiction.—Now, why does the act call ſuch perſons offenders? Becauſe eſcape was, of itſelf, and, without any other guilt whatſoever, an high offence at the common law, and attended with a forfeiture of goods and chattles, even though the perſon eſcaping was afterwards acquitted of the charge for which he fled; and the formal direction to Juries at this day upon criminal trials, to enquire if the culprit fled for the ſame or not, ſhews what the law is upon this ſubject.

In legal contemplation it is in this ſenſe alone that the perſons deſcribed in the 23d Geo. II. can be called offenders. Let us therefore ſubſtitute the terms of the definition in the room of the term defined, and the recital of the 24th of Geo. II. will run thus, "And whereas perſons *eſcaping* may reſide and be in ſome other county, &c. before the granting of ſuch warrant, and without eſcaping out of the county, &c. *after* the granting of ſuch warrant." If the act had not meant to confine itſelf to offenders eſcaping, its language would have been very different. It would have recited the miſchief thus, "Whereas perſons committing offences, or procuring offences to be committed in one county, may reſide and be in another county, &c." Now, the words "and without eſcaping *after* warrant granted," are the ſame as "not having eſcaped after warrant granted," and are as complete a negative pregnant as can occur in any form of ſpeech whatſoever, and directly imply eſcape *before* warrant granted. I therefore conſider this as a full and legiſlative declaration of the deſcription of perſons to whom thoſe acts are to apply, and on what kind of perſons reſiding or being in another county, out of the juriſdiction of the Juſtice granting the warrant, it meant to attach its proviſions. The firſt act expreſsly relates to perſons eſcaping *only*. The ſecond directly refers to that deſcription under the words "ſuch offenders. The firſt is confined to eſcape *after* warrant granted: the ſecond extends to eſcape *before* or *after*; and both are confined to *eſcaping* offenders.

But this will be ſtill more manifeſt if you conſider what is the ultimate evil ſtated by the 23d of Geo. II. againſt which

which it was neceſſary to provide a Legiſlative remedy; it is that thereby, that is, by *eſcaping*, ſuch perſons avoid being puniſhed: *impunity* of offence by eſcape or removal *out* of one juriſdiction *into* another is the public grievance; no new or other miſchief is recited by the ſtatute of the 24th of Geo. II. Is it then unfair to conclude, or rather muſt we not neceſſarily do ſo, that the miſchief intended to be guarded againſt *by* both theſe acts, and fully and clearly expreſſed in the firſt, is the ſame; but that the remedy provided by the firſt was not coextenſive as it ought to be with the evil. The ſecond act therefore was paſſed, and was intended to embrace all perſons who manifeſted their guilt by flight; the firſt having prepoſterouſly confined its operation to this manifeſtation taking place *after* warrant, though in truth the conſciouſneſs of crime, which is always coeval with the act, was likely in moſt inſtances to produce this manifeſtation long before. It follows, from the view I have taken of theſe acts, that *actual* violators of the public peace *eſcaping* or *removing* out of the juriſdiction where they had committed the offence, and *thereby* avoiding the puniſhment due to their offences, are the objects of this law—none others are within the miſchief—none others ought to be within the remedy.

Any difficulty or embarraſſment in the conſtruction of thoſe acts ariſes from the legal fiction, that in miſdemeanors all are principals. In any higher ſpecies of crimes, in which the diſtinction between principal and acceſſary is preſerved, it could never have occurred to any man, that the acceſſorial offender remaining quietly where he had been guilty of the acceſſorial offence, and in which place alone by the law of England he muſt be tried, if tried at all, could, under the operation of this law, be taken under a warrant iſſued where the principal offence was committed, and endorſed according to the proviſions of the law now under examination.

Now let us apply theſe acts, both with reſpect to the miſchief recited in them and the remedy provided by them, to perſons charged with miſdemeanors procured by them to be committed in another juriſdiction than that in which they live, and who have never removed from the place in which the act of procurement was committed. For the

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ſake of a ſhort expreſſion and one ſufficiently clear I will deſcribe ſuch perſons as perſons charged with a conſtructive miſdemeanor. The expreſſion though not ſtrictly accurate is ſufficiently ſo for the preſent purpoſe, it being underſtood that I mean thereby perſons who, by advice or *other* procurement, effect the commiſſion of a miſdemeanor in another county than that in which they reſide, and are therefore in law, if *reſident within the realm of England at the time of ſuch procurement*, principals in the miſdemeanor ſo adviſed or procured to be committed within another county *of the ſame* realm—my reaſon for thus confining the acceſſorial and principal offence to the ſame part of the United Kingdom will be ſeen hereafter. The fundamental miſchief to be provided againſt by thoſe acts is the avoiding puniſhment by offenders, and that in truth by the only way in which puniſhment can be avoided, by ſome agency on the part of the offender.—Now by what proceſs of reaſoning can this apply to a man who never ſtirs from the uſual place of his abode, who lives in the ſcene of every act of his life, and can be reached without difficulty or delay by any legal proceſs iſſuing within the juriſdiction in which he lives?—has ſuch a man done any act whereby he can *avoid* puniſhment?—is he not exhypotheſis ſo far from avoiding legal proceſs, and thereby avoiding puniſhment, amenable to the authority of every Juſtice within the county in which he lives?—The offence in which in legal contemplation he is conſidered as a principal, being committed elſewhere, makes no difference—any Juſtice of the Peace may commit an offender within his juriſdiction though for an offence committed out of it. This is fully laid down in Comyn, title Juſtices of the Peace; and indeed in every book of authority treating of the duty of Juſtices of the Peace.—What reaſon then, for any purpoſe of public juſtice, can there be for giving the celerity of a courier to legal proceſs againſt a man who has never removed from the juriſdiction to whoſe authority he was ſubject every hour of his life, who has furniſhed no concluſion of guilt by flight, and who, ſo far from avoiding puniſhment by any act of his, remains within the level of that authority which is always pointed at offenders within its juriſdiction?

In caſes of eſcape the remedy muſt be quick or it would be abortive. The ſimple act of endorſement by a Juſtice

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is therefore made ſufficient to give efficacy to a warrant brought againſt an eſcaping offender.—What reaſon can there be for adopting this remedy againſt a man who remains at his poſt?—ſhew me the poſſibility of ſuch a man not being amenable to the law, or by any act of his avoiding puniſhment, and I will give up the queſtion.

Let us now proceed to the 13th of the King, c. 31.—The miſchief recited in its preamble is the *eſcape* of *felons* and other malefactors, whereby their offences remain unpuniſhed. I will not now argue upon the import of theſe words as deſcriptive of a certain claſs of offenders only. I do however no violence to language in referring the whole deſcription to the perpetrators of crimes by *actual* preſence eſcaping or removing, in oppoſition to perſons charged with conſtructive miſdemeanors who have never eſcaped or removed at all. The enacting part of this Statute of the 13th of the King is the ſame *mutatis mutandis* with the enacting part of the 24th of Geo. II. except in one particular, which not relating to the preſent part of the argument I ſhall not now notice, but to which I mean hereafter to ſolicit the attention of the Court. The clauſes however being thus ſimilar, it is manifeſt that every obſervation I have made upon the 24th of Geo. II. apply at leaſt with equal ſtrength to the 13th of the King. This law has been in force above thirty years between England and Scotland, and not a ſingle inſtance is produced of its ever having been applied to any other than caſes of eſcape.

I have now, my Lord, come in order to the act upon which the preſent queſtions ariſe. It affects to embody the ſeveral acts to which I have already called the attention of the Court, and to give to this country the benefit of ſimilar proviſions. The framers of it had before them all the preceding acts, and at one view could ſee the objects, miſchief, and remedy. With theſe before their eyes they framed the *title* of the preſent act. What is it? it is entitled, "An act to render more eaſy the apprehending and bringing to trial offenders *eſcaping* from one part of the United Kingdom to the other and from one county to the other." Before I proceed, allow me, my Lords, to recall to the recollection of the Court a few of the leading rules adopted by wiſdom and experience in the conſtruction of acts of Parliament.

Parliament. My Lord Coke says, *optima statuti interpetratrix est ipsum statutum, et injustum, nisi totâ legê inspectâ, una aliqua ejus particula judicare vel respondere.* Every statute* ought to be expounded, not according to the letter, but according to the intent, and a case out of the mischief intended to be remedied should be construed to be out of the purview, though it be *within the words of* the statute. That the title, and much more the preamble, are things to be resorted to, to explain the meaning of the Legislature. The mischief recited in that part of this act regulating the arrest and transmission of offenders from one part of the United Kingdom to the other, is "That felons and other malefac-"tors in one part of the United Kingdom *make* their "*escape* into the other, *whereby* their offences often remain "unpunished."—Now, though you should not confine the operation of this act to cases of possible *impunity* by escape, yet still you must refer it to cases of impunity by some *act* or *agency* of the offender. You can by no reasonable construction refer it to the case of a man who never leaves the jurisdiction within which he was born; who betrays no disposition to evade the law, and manifests no sense of guilt by flight. Shew me the possibility of a man, if this act had never existed, not being amenable to the law, who *remains* where he has done any act, capable of proof, either constituting an offence in itself, or leading to the commission of ONE elsewhere, and I will give up the question.

I beg here to apply the observation of one of your Lordship's to the question now before you—My Lord said, in one part of this argument, "It would be an odd way to "get at the sense of an act of Parliament by getting rid "of the words of it."—I am ready to determine this question by the rule to be collected from your Lordship's observation, which I presume to be, that in the construction of an act of Parliament, *all* the words used in it are to be considered. It is insisted on by the Counsel for the prosecution, that it avails not in what part of the United Kingdom the individual who is the object of prosecution resided at the time of the commission of the alledged offence, whether within that part of the United Kingdom where the offence is charged to have been committed, or in a totally distinct part of it, or, which in truth is the same matter in effect,

* 2d Rol 318.——2d Inst. 386.

whether he ever removed from the juriſdiction in which he is charged to have offended. Now, under this conſtruction, I would be glad to know of what imaginable import are the words "*eſcape and go into.*" The firſt of theſe words you find *uſurping* a very important place in the title of the act, and one not leſs ſo in the preamble, where the miſchief to be guarded againſt is recited, and you have them all *in full array* in the enacting clauſe: yet under the conſtruction now inſiſted upon, they are not merely nugatory and uſeleſs, but occaſion doubt and perplexity in a motive, which, without them, would admit of neither one or the other.

It may ſometimes be a good way to convince the underſtanding through the medium of the ſenſes. Let us ſee, therefore, how this act will read, leaving out the words "*eſcape* and *go into*," and confining it to the *all*-comprehenſive words relied upon by the other ſide, *reſide* and *be*:—The title, as far as relates to the preſent queſtion, would run thus—"An act to render more eaſy the apprehending "and bringing to trial offenders againſt whom Warrants "ſhall be iſſued in one part of the United Kingdom, "*reſiding*, or *being* in the other:"—The preamble will run thus—"And whereas it may frequently happen, that "felons and other malefactors in that part of the United "Kingdom, called England, may *reſide* or *be* in that "part of the United Kingdom, called Ireland, whereby "their offences often remain unpuniſhed:"—And the enacting part thus—"For remedy whereof, be it enacted, "if any perſon or perſons againſt whom a Warrant ſhall "be iſſued by any of the Judges of his Majeſty's Court of "King's Bench, &c. or other perſons having authority to "iſſue the ſame within England or Scotland reſpectively, "for any offence againſt the laws of England and Scotland "reſpectively, ſhall *reſide* or *be* in any place of that part "of the United Kingdom called Ireland, it ſhall or may "be lawful for any Juſtice of the Peace of the county or "place in Ireland, where ſuch perſons ſhall *reſide* or *be*, "to endorſe his name on ſuch War rant, &c."

Thus, it is manifeſt, that in every part of the act as it now ſtands, the words "eſcape and go into" may be left out, and the words "reſide or be" will be all-ſufficient for the conſtruction inſiſted on by Counſel for the proſecution,

tion, with this manifeſt advantage, that no doubt whatever could then be entertained of the meaning of the Legiſlature; and whatever might be the conſequences to the hitherto eſtabliſhed principles of law and liberty, the Court would be bound to give effect to a meaning ſo unequivocally expreſſed: thus we ſee that the words "eſcape and go into" are not merely idle and nugatory, but in the conſtruction contended for their introduction gives doubt and perplexity to what would be perfectly explicit without them.

It has been ſaid, (for what is too bold for aſſertion?) that the words "reſide or be" are idle and nugatory, according to the conſtruction I am endeavouring to ſupport. This may be determined in a moment, by ſeeing how the act would ſtand without them. It would be ſubject to preciſely the ſame defect under which the act of the 23d of George II. on which I have already obſerved, labours; that is, it would only apply to perſons who had eſcaped *after* warrant iſſued; and to remedy which, the act of the 24th of George II. was paſſed in the enſuing year. Leaving out the words "reſide or be," the enacting clauſe in the act now before you will be, as to this head of the argument, preciſely ſimilar, *mutatis mutandis*, with the act of the 23d of George II. and therefore ſubject to the defect under which that act laboured, of being confined to eſcapes after warrant iſſued. The act now before you, however, following the act of the 13th of the King, between England and Scotland, does, as that had done before, by the uſe of the words "reſide or be," prevent what without them would have been a defect, and extends the proviſions of the law, as the 24th of George II. had done as to the 23d of George II., to caſes where the party had not eſcaped *after* warrant granted. The legiſlative deciſion, therefore, as to the defect of the 23d of George II. ſhews what this act would be without the words "reſide or be;" and alſo ſhews the neceſſity of uſing them to extend the proviſions of the law to caſes of eſcape or removal *before* warrant granted. Every word, therefore, in the act as it now ſtands has, according to *my* conſtruction, a full and appropriate meaning; and the words "eſcape and go into," though the firſt of them in fact gives title to the act and deſignates the miſchief in the preamble, and though both occupy a prominent place in the enacting clauſe, may be altogether rejected upon *theirs* as idle and nugatory; or, indeed, ought rather to be rejected, as perplexing what would be clear and explicit without them.

But the moſt important part of this argument yet remains to be ſtated. I have ſaid, that the Legiſlature, in the act before you, could only have *eſcaping* offenders in their contemplation; and for this plain and obvious reaſon, that except in treaſon (which caſe ſtands on peculiar grounds, as I will hereafter ſhew,) no perſon, not being a native or reſident of England at the time he does any act by which he may have procured others to commit offences againſt the laws of England, can himſelf be an offender againſt the laws of England, or upon any principle of known juriſprudence ſubject to their animadverſion. As this act, therefore, creates no new offence, to extend it to ſuch perſons would be *brutum fulmen*, and an abſurdity of ſuch weakneſs and folly as you cannot attribute to the Legiſlature. I mentioned before, that there were words in the act now before you, and in the 13th of the King in England, which are not to be found in the acts of the 23d and 24th of George II. The words are: "*for offences againſt the law of England.*" Why thoſe words were introduced into the latter acts and omitted in the former I will not ſtop to enquire. They ſhew, however, manifeſtly, if it were not otherwiſe clear from good ſenſe and right reaſon, that none but offenders againſt the laws of *England* can be the objects of this law; and in that point of view, I truſt, I will demonſtrate, that it of neceſſity can apply only to perſons *eſcaping* or *removing* out of the realm of England.

Before I proceed with this part of the argument, I will juſt obſerve, that the Union between England and Ireland, which has lately taken place, has produced no alteration in the queſtion I am about to examine. The countries are ſtill governed by *their own proper laws and ſtatutes*; and all their municipal juriſdictions, with the exception of the Houſe of Lords on appeals, or writs of error, are as diſtinct as ever: no Engliſh law, *as ſuch*, is binding in this country, or *vice verſa*. The laws of each country have the authority they ever had, rightfully, and no other.

Crimes are of three claſſes, natural, moral, and municipal. The avoidance of crimes natural or moral, as ſuch, is the duty of every man, under whatever government he is born, or in whatever part of the world he reſides. Many crimes, natural and moral, are alſo municipal; but many are not.

not. What diſtinguiſhes municipal crimes from natural and moral crimes which are not municipal, is the *temporal* ſanction which always attends the violation of the former. The obligation to obſerve the latter is eternal and immutable by time or place: its ſanction, however, is not of this world—not ſo of *mala prohibita* whether they be *mala in ſe* or not. Temporal ſanction is their *peculiar* characteriſtic. With reſpect to them, the liability to the penalty and the duty of obſervance are exactly commenſurate. What does it ariſe from?—It ariſes either from being a ſubject of the particular community whoſe law is in queſtion, or an occaſional ſojourner there at the time of the alledged breach of the law. It is unneceſſary to trouble *this* Court with the reaſons which make theſe circumſtances the ſources of municipal obligation. A municipal offence may, therefore, be defined to be "an act committed or omitted in violation of a public "law forbidding or commanding it, by a perſon bound "to obey that law."

Authority, I mean rightful authority, and obedience, are of neceſſity commenſurate; and as far as the firſt extends and is lawful, ſo far is the other to be enforced and due. I know authority often extends where it is not lawful, and obedience is enforced where it is not due. I am at preſent, however, talking of the legitimate boundaries of each. To conſtitute, then, a municipal offence, three things muſt concur:—firſt, a public law—ſecondly, a fact prohibited by that law done within the limits of municipal juriſdiction—thirdly, that fact committed by a perſon bound at the time of the commiſſion of it to obey that law. Let us examine this by a familiar inſtance:—Many acts prohibited by the revenue laws conſtitute miſdemeanors, for which the perſon offending may be indicted. I chooſe ſuch an inſtance as this, becauſe ſuch matters are in general merely *mala prohibita*, and nothing more. Suppoſe, then, a native and reſident of France, acquainted or unacquainted, which you pleaſe, with the revenue regulations of England, wrote a letter to his correſpondent there, giving certain directions which, if complied with, would effect a breach of that law in the perſon ſo complying; as in miſdemeanors all are principals, ſuch a perſon, if bound by the law, would be a principal offender. Now, I aſk any one above the rank of an ideot, if ſuch a man ſhould afterwards come into England, could he be tried for that imputed offence upon

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any principles of known juriſprudence? Let us aſcend then a little higher in the ſcale of municipal offences:—Suppoſe a native and reſident of France procures a robbery to be committed within the realm of England: if the perſon procuring ſuch an act to be done reſided within the realm of England, he would be an acceſſary before the fact in felony, and as ſuch might be tried and puniſhed: if the procurement, however, were out of the realm, as it would be in the caſe ſuppoſed, he would have committed no offence againſt the laws of England. He will fall into great error on ſuch ſubjects who confounds municipal with moral guilt. The latter, *as ſuch*, is no ſubject of municipal cognizance: therefore, by the *common law* of England, if two Engliſhmen go into a foreign country, and fight there, and the one murders the other, the *lex terræ* extended not thereto; and in the caſe ſuppoſed, of a felony procured to be committed within the realm of England by a native and reſident of another country, there is no form of proceeding known to the law of England by which ſuch a perſon, even arriving afterwards within the juriſdiction, could be proceeded againſt or puniſhed. If any man doubts as to this poſition, I would aſk him, what Grand Jury of England could indict for this alledged offence?—Not the Grand Jury of the county where the principal felony was committed; for the party had done no act there which could give them authority to preſent.* At common law, where the perſon procuring the felony to be committed reſided in a different county from that in which the felony was committed, it was extremely doubtful whether he could be proſecuted at all. This, however, as to acceſſorial offences in felony committed *within the realm*, was remedied by the 2d and 3d of Edw. VI. whereby it is provided, that acceſſories in murder and felony may be indicted *in the county* where the acceſſorial offence was committed, though the principal felony was committed elſewhere; and it provides for procuring a certificate of the attainder of the principal, without which the acceſſory could not be tried. In the proviſions of this law, we perceive how ſcrupulous our anceſtors

* The reaſoning here is grounded on the law of England. I admit the ſtatute of the 10th of Charles I. in this country renders a perſon reſident out of the realm, and procuring a felony to be committed within it, liable to be tried where the principal offence is committed. This, however, is only another exception, by ſtatute, to the common law rule.

ceſtors were in adhering to the common law principle, *ubi deliquit ibi puniatur.*—If A. reſiding in Cornwall, procured a murder to be committed in Middleſex, he could not be proceeded againſt in the latter, but muſt be tried in the place where he had done the act, from which a felony had reſulted elſewhere. There is no law in England by which any crime, under treaſon or murder, committed abroad by a ſubject of England, or by which any felony *procured* to be committed within the realm of England by a perſon reſident abroad, can be proſecuted or tried in England. Treaſon and murder are exceptions to this rule, and for reaſons that extend not to other offences. Treaſon is a perſonal contract, if I may ſo ſpeak, with the Sovereign, that follows the individual into whatever parts of the world he may go —on the banks of the Thames, or the banks of the Ganges, he is equally a ſubject, and reſponſible for his duty to his Prince. This duty is attached upon him at his birth, and nothing but death can ſet him free. But even with reſpect to treaſon committed *out of the realm*, the common law principle I have mentioned was found too ſtubborn to bend; and therefore the 35th of Henry VIII. makes treaſon, miſpriſion and concealment thereof, done out of the realm of England, triable by the King's Bench, wherever it ſhall ſit, or by Commiſſioners to be appointed by the King. As to murder, it is not more an offence againſt the particular community than againſt human kind at large; it is, as it were, treaſon againſt humanity: God himſelf has denounced the offender, and all mankind have his licenſe to purſue the murderer; and ſuch was the opinion of Cain when he ſaid, whoever ſhould find him would ſlay him. Therefore the 33d of Henry VIII. c. 23. which, as to murder, is not repealed, gives power to try murders committed out of the realm to Commiſſioners appointed purſuant to that act. It is however held, that this act does not extend to acceſſories, 2d Hawk. 404. Theſe acts, extending the arm of municipal authority out of the realm, in the extraordinary caſes of treaſon and murder, to which, by the received principles of common law, it could not reach, ſhew in the moſt ſtriking manner he boundary by which the municipal law of England is limited.

From the ſame limitation, in point of principle, of the common law of England, it was found neceſſary to provide, by

by particular ſtatute, for the trial of treaſons and felony committed on the high ſeas; and this was done by the 28th of Henry VIII. c. 15.

Thus we ſee, that the common law of England could not travel an inch beyond its ſhores; and wherever it was neceſſary to extend the authority of the law of England beyond that limit, it was neceſſary to have recourſe to what my Lord Coke calls the omnipotence of an act of Parliament; and that even thoſe acts have never ventured to embrace any offences abroad but treaſon and murder, and felony upon the ſeas. The ſtatute of George I. providing for the trial of offenders in murder, where the ſtroke or poiſoning happens abroad and the death in England, and *vice verſa*, is of the ſame deſcription.

From a review of theſe ſtatutes it is manifeſt, that where a felony is committed in England, by the procurement of a perſon not reſident within it, ſuch procurer cannot be tried by any known principle of law, or by any particular ſtatute. I will not be contradicted when I aſſert, that there *can* be no offence againſt the law of England—that there does not exiſt an appointed mode for trying the offender; and if I ſhew an act that, phyſical impediments being removed, cannot be tried by the law of England, I ſhew an act that is no offence againſt the laws of England.

The prohibition of unwritten, as well as of written law, may be reduced to preciſe terms. When the law, whether common or ſtatute, prohibits any particular thing to be done, its language is "if any perſon or perſons, &c." —and whom does it mean by theſe words? Not all the world—it would be ridiculous nonſenſe, and mere *brutum fulmen*—it means ſubject or reſident.—Extended beyond that meaning, (with ſome exceptions perhaps, as piracy, warranted by the *law of nations)* it would be a law of force and tyranny. The principles I have laid down apply to all offences againſt the laws of England. Let us, however, conſider them a little more particularly with reſpect to miſdemeanors:—In all felonies not capital at common law, and in all criminal treſpaſſes, there are no acceſſories. This rule is adopted in ſuch caſes, on account of the exility of the offence, *quia de minimus non curat lex.*

Any

Any perſon who would be an acceſſory before the fact in felony, would, if the principal offence were a miſdemeanor, be himſelf a principal offender; and, *vice verſâ*, any perſon who procures a miſdemeanor to be committed, would, if that miſdemeanor were a felony, be an acceſſory before the fact; and no perſon procuring a miſdemeanor to be committed, could be puniſhed as a principal offender, if that perſon would not be, upon the ſuppoſition that the offence were a felony, an acceſſory *before* the fact, and triable as ſuch.

Let us ſuppoſe then, for a moment, that the publication of a ſeditious libel, were a capital felony by the law of England—it is manifeſt, that, if there be any foundation whatever in the charge againſt the Gentleman now before you, it muſt be for acts done by him *here*, procuring the publication in London, that is, for acts done by him, which, if done within the realm of England, would make him, in caſe the offence amounted to felony, an acceſſory before the fact to the crime in England. Thoſe acts, however, be they what they may, if done at all, took place out of the realm of England, and beyond the ſphere of its municipal juriſdiction. As the law of England ſtands, I would be glad to know if the principal offence were a felony, where the party accuſed of ſuch act of procurement could be indicted?—The argument, therefore, on the other ſide is this, that if a perſon, not a ſubject of the municipal law of England, and reſident out of the realm, were to procure the city of York to be conſumed by fire, and were to land the next day in England, he could not be tried for any known offence againſt the laws of England,* (for an offence without means of trial or puniſhment is nonſenſe,) but if the ſame individual, under the ſame circumſtances, had procured any perſon to kick a ſcoundrel in England who had inſulted him, the mighty powers of the State are all to be ſet in motion, and that if he were a native and reſident of Ireland, he might be dragged from Donegal to London, there to expiate his crime by a fine of a mark; or if he were a native and reſident in any other country, and ſhould, at any future period of his life ſet his foot in England, he might be indicted and tried for an act, for which, if it had procured the commiſſion of a felony, he could not be tried at all.

 But

* How a perſon thus circumſtanced might be treated according to the law of nations makes no part of the preſent diſcuſſion, which is confined to municipal obligation merely.

But it will be aſked, ſhall offences inſtigated by perſons reſident without the realm to be committed within it, go unpuniſhed? Let us recollect, that we are now talking of municipal offences, which, merely as ſuch, have nothing to do with moral guilt. If by the word offence is meant the act done by the perſon reſident out of England, it is begging the queſtion to call *it* an offence againſt the law of England: but if the queſtion be, ſhall the fact committed *in England* be committed with impunity? I anſwer, no. In the caſe of a libel, for inſtance, procured to be publiſhed in England, every perſon guilty *there* of publiſhing may be puniſhed to the utmoſt fatiety of revenge; fine, impriſonment, pillory, and whipping, form the ghaſtly train of the chief informer of the Crown—that he ſhould be able to travel with theſe in his rear from the Engliſh Channel to Solway Frith, and from the German Ocean to the Iriſh Sea, might, one would think, ſatisfy his appetite for power. Could it have been the intention of the law, in deſtroying the diſtinction of principal and acceſſory in miſdemeanors, to give a wider ſphere of power to municipal law in miſdemeanors than it has in caſes of felony, and that there ſhould be a ſort of magic in the pettieſt offences that will bring an individual, reſiding in a realm utterly foreign as to municipal law and municipal juriſdiction, procuring a miſdemeanor to be committed in another country within the pale of an authority, which, if he had procured a murder to be committed within it, could not reach him?

What is the true principle in all ſuch caſes? Why, that ſubject or reſident are the true boundaries of municipal juriſdiction—the one a duty caſt upon us at our birth; the other impoſed upon us by our own act for a time. That, in either caſe, our obligation to obey, and, of courſe, the right of the State to puniſh, ariſes from * our own conſent, either actual or neceſſarily implied: That there is a marked diſtinction between being ſubject to the King, and ſubject to the laws of England. In the former caſe, we may commit treaſon any where; in the latter, we can only offend as an original ſubject, or a temporary reſident; and that,

* See 4th Blackſtone's Commentaries, p. 8.

that, in all cases, legitimate authority and legitimate obedience are exactly commensurate, and that to extend either beyond their true bounds, would be force and tyranny, and not law.*

But let us consider, for a moment, what object is answered, or intended to be answered, by putting this construction upon the present act of Parliament. A law, that let the construction of it be what it may, it is admitted on all sides, was passed to prevent offences remaining unpunished. It now appears, that not only previous to the existence, but previous to the *possible* existence of this alledged libel, the Gentleman now brought before you was in Ireland, and has been a continuing resident therein from that time to the present. It is sworn, and not denied, that the paper containing those supposed libels, was *first* actually published in London. If therefore the defendant be guilty of that or any subsequent publication *there*, it must be by procurement, and the act of procurement must have been committed *here*. That act of procurement must be given in evidence wherever the trial shall be had, if there exist any hope of an effectual prosecution. Now, whether that act of procurement, (if any act of procurement ever existed) consisted in writing the libel himself in this country, or copying it, if written by another, or sending it, whether written by himself or another, to England for publication, there is no imaginable act by which the publication in London could be procured, that, if done by the defendant, must not have been done *here*. If done here, the witnesses to that act of procurement, whether by writing, copying, or sending, must reside here. Wherever the trial is had, that fact, be it of which of those enumerated descriptions it may, must be proved. It is sworn, and not denied, that the indictment stated in the warrant of the Chief Justice of England, has been found on the information of persons resident in this city. It is also sworn, and not denied, that

* No *legal* mind will confound the reasonings here on the principles of the criminal law of England with what takes place in *transitory civil actions*, which, if the parties come to reside in England, may be tried there, though the cause of action arose out of the realm. In such the obligation, upon which the action is founded, is of no place, and *follows* the person; but, even in such case, the contract must be tried by the law of the place where it arose, if different from the law of England.

the papers containing the alledged libels have been publicly ſold in the city of Dublin, and are now offered, and to be had there for ſale. It ſtands therefore admitted, that if any evidence whatever exiſts, either of procurement or publication, which can at all apply to the defendant, ſuch evidence can be given in the city of Dublin *. It is ſworn, and not denied, that the circumſtances about which the papers containing the alledged libels treat took place in Ireland, and it appears from the return, that the perſons ſuppoſed to be attacked are reſident here—ſo that if the offence complained of have any exiſtence at all, and is proveable any where, it took place and is proveable in Ireland. The matters about which the papers alledged to contain the libel in queſtion are converſant relate excluſively to Ireland, and the perſons complaining of any imputations caſt upon them are reſident here. The alledged offence took place here, the alledged offender is on the ſpot, the perſons complaining reſide here, the matters in queſtion relate to this country, and the evidence, if any can be had to affect the Gentleman now before you, exiſts within the limits of this metropolis; yet it is ſought to try this queſtion at a diſtance of 400 miles, where the accuſed can have no witneſſes, and where the tranſactions upon which the queſtion of libel or no libel muſt turn, are utterly unknown.

Now the real and exact truth of any particular tranſaction forms but one, oppoſed to the thouſand combinations of circumſtances which prejudice, ignorance, malice, or corruption may put together as repreſenting it; and the further you remove from the ſcene of action, the more the chances are diminiſhed that this real and exact truth will appear. The motives, therefore, for ſubjecting the inveſtigation of this buſineſs to a foreign tribunal, can ſcarcely eſcape the dulleſt apprehenſion.

In the courſe of this diſcuſſion, I have heard a ſtrange doctrine ſtated, that the *pax Regis* in Ireland and the *pax Regis* in England were altogether diſtinct, and that the *ſame act* might be a violation of each, and therefore puniſhable by diſtinct proſecutions. No doubt this is a convenient doctrine for

* The mere act of tranſmiſſion from this country, by poſt or other conveyance, would, in law, amount to a publication, which would ſupport either an indictment or action here—ſo that the crime, if any, was complete in this country, independent of actual publication here by printing.

for a Law Officer of the Crown; it is, however, a new one, and deſerves to hold a diſtinguiſhed place in modern diſcoveries. With reſpect to the King, I thought his ſubjects were not Iriſh ſubjects, or Scottiſh ſubjects, or Engliſh ſubjects, but ſubjects merely of one common King, and that the *pax Regis* was the ſame in every corner of the united kingdom, though the protection of it was meted out to diſtinct juriſdictions and authorities, and regulated by diſtinct laws. Ireland and England have been connected about 800 years, and England and Scotland about 200. About four years have elapſed ſince the two firſt were united, and near a century ſince the union took place between the two laſt. The relation either of Scotch or Iriſh to the King has been no way affected by theſe unions. Why then was this diſcovery of the diſtinct peace of the King, or rather of the effects flowing from it, reſerved for theſe times? Though the grounds upon which this diſcovery reſts are concealed, the object of it at leaſt is candidly avowed—it is to try the Gentleman now before you in each part of the United Kingdom to which the publication charged upon him as an offence has reached; and the firſt experiment is to be made where he can make no poſſible defence. Is it that gentlemen deceive themſelves, or that they hope to deceive others? If the latter, I am inclined to give them as little credit in point of ſagacity, as I am diſpoſed to allow them their full ſhare for an ingenious refinement in the law of pains and penalties, that had eſcaped all their predeceſſors. But, ſo long as the principles of the law of England are cheriſhed and adhered to, allow me to ſay, that if there had been ten thouſand publications of the libel (if it be one) in queſtion, and that ſuch publication took place in every diſtrict of the wide extended dominions of our Sovereign, and that you could prove but *one* act of procurement or of publication againſt the defendant, you could never try him but once as long as any reſpect remains for the principles of our law.

But let us return, my Lords, to the ſtatute now before you.—I can imagine, if you will, an act, looſe and ambiguous in its terms, paſſing the Legiſlature: I can imagine, (for who that reads the hiſtory of thoſe countries can avoid it,) the perſons employed in a Crown proſecution wiſhing to make an oppreſſive uſe of an act ſo worded: but

I cannot

I cannot imagine a conſtitutional Court of Law, where two oppoſite conſtructions are ſupported by ſuch arguments as you have heard, adopting that which gives a mortal wound to private right and public liberty.—I cannot account for the bold hope which has ſupported thoſe whoſe arguments lead to ſuch violations—for the daring expectation, that *in this place* they would find the means of accompliſhing the ruin of the Conſtitution; that, not content with conſuming the aweful Temple of our Liberty, they are raſh enough to drag for this purpoſe the fire from its altars.

In the deſire, then, to remand this Gentleman, let us ſee, my Lords, in a few words, what you are called upon to do: —You are called upon in a caſe, bailable *ex debito Juſtitiæ*, to conſign him to impriſonment in the country which gave him birth, and where his connexions lie.

You are called upon to ſend him, with an inſulting mockery, to look for bail in a country where he may have no acquaintance, much leſs a friend.

You are called upon under an act, paſſed, as it expreſsly imports, for the apprehenſion of offenders who *eſcape*, and whoſe offences *thereby* remain unpuniſhed, to tranſmit to a foreign country, (foreign as to laws and juriſdiction,) a perſon who *never eſcaped*, and whoſe offence, if any, can be puniſhed where he is.

You are called upon, under the magic of a legal fiction, to ſend a man to be tried 400 miles from the place where he could have done any perſonal act whatſoever, and under circumſtances, that, if the offence he is alledged to have procured were a felony, you could not reach him.

You are called upon, to ſend him to be tried by a juriſdiction, and under a ſyſtem of laws, to him, in a municipal ſenſe, perfectly foreign; and that in a caſe in which, if he has been guilty of any offence at all, his offence is complete in his own country.

You are called upon in an avowed State proſecution, to ſend him out of his own country, with the public purſe in the hands of his proſecutors, to be made uſe of for all purpoſes which

which may be deemed *expedient* to eſtabliſh the crime againſt him, without any poſſible means, on his part, of rebutting it by proof.

And, you are called upon to do all this, to enable the party complaining to avoid a trial on the merits; and, by the ſame deciſion that you ſtrengthen the hands of the proſecutor, to ſtrip the accuſed of all poſſible means of defence—and that in a caſe of *acknowledged* doubt upon the conſtruction of an act of Parliament.

You are called upon to run the chance of doing wrong, (I do not ſurely ſtate it ſtrongly, when, even among the learned Judges of the land there exiſts ſtrong difference of opinion,) in favour of avowed oppreſſion, of undiſguiſed hardſhip:—and to what end?—To give ſecurity to an abuſe of power, and to ſtrip the accuſed of the right, (for right without means is mockery,) of defence.

For my part, (let others enjoy *their* triumphs,) I ſhall feel a ſatisfaction to the end of my life in having made a ſtruggle, however ineffectual, to uphold the acknowledged maxims of our Law, the eternal principles of Juſtice, and the common rights of Humanity!

I know I ſhall have the ſympathy of the good—I look to the gibes of the unfeeling.—Welcome both—in reſiſting "the oppreſſor's wrong," I may expect "the proud man's contumely."—I ſhall feel, however, what he never can, that peace of mind, which, like the peace of God, paſſes the underſtanding of the wicked.

The PRIME SERJEANT

Said, that the gentlemen to whom he was oppoſed, ſeemed fairly to have divided the ſubject between them. One had taken the argument, the other the eloquence: one the reaſoning, the other the wit. As to the eloquence it was beyond his reach, and in his humble conception miſplaced on a mere law queſtion. As to the jokes, he was a bad jeſter, and therefore ſhould beg leave to reply to the argument.

He

He had however the greateſt reſpect for the extraordinary talents of the learned gentleman whoſe oratory had produced ſuch a vaſt effect, for the uncommon reſources of his mind and quickneſs of his genius, always able at the inſtant (to uſe his own phraſe) to draw at ſight upon thoſe reſources; but he could not avoid thinking, that in the alembick of his imagination, the argument often evaporated, and he was to ſearch for any reſidue of reaſonings, not in a buſhel of chaff, but in an ocean of fancy; and when he heard his learned friend, on the interpretation of an act of Parliament, ſay he would not ſubmit to the drudgery of verbal criticiſm, he could not but ſmile; and when after a moſt beautiful declamation of an hour he ſaid, but now let us come to the ſubject, it reminded him of the famous lines,

"And now to ſerious council let's advance;
"But firſt let's have a dance."

The PRIME SERJEANT proceeded to ſtate, that the argument which he was to anſwer was twofold; firſt, that the act of the 44th of the King, ch. 92, doth not extend to libels or any inferior crimes; ſecondly, that if it doth, it at moſt extends only to perſons who, having been guilty or charged with ſuch offences, and warrants thereupon iſſued, eſcape from one country into the other.

To anſwer theſe objections, continued he, we muſt endeavour to find out the object of the act, and ſecondly to examine its words and its proviſions.

The object I conceive, ſaid he, was, to put Ireland, after the Union, on the ſame footing with reſpect to England that one county in England had formerly been to any other county in England, as far as circumſtances could poſſibly admit: what elſe could be the object? Could it be merely to empower a Juſtice of the Peace to back warrants? Can I believe, that an enlightened Legiſlature meant to reſerve liberty to any offender in Ireland of diffuſing mental pain and miſery over the empire, like a baneful comet, and then ſhelter himſelf in the nucleus of this our little reſidence--could this be the intention? It would be a proclamation for abuſe, an avowed indemnity for ſcandal, a premium of ſecurity for malice and revenge; and every man in England might

might fully vent his ſpite againſt his neighbour, through the medium of his friend or acquaintance in Ireland.

From the monſtrous abſurdity of ſuch a conſtruction I proceed to ſhew the real meaning and object of this law, from the conſideration and review of the acts upon which it was founded, and of which it was compoſed; theſe are the 24th of Geo. II. ch. 26. 24th Geo. II. ch. 55. and 13th Geo. III. ch. 31.

By the common law, the power of finding an indictment for an offence in any county being confined to the Grand Jury of that county, and the power of Juſtices of the Peace confined to their reſpective counties, if an offender eſcaped from one county into another, he could not there be arreſted without a freſh warrant from a Magiſtrate of that county into which he had eſcaped, who had no power of admitting him to bail, but could merely remit him to his proper county. To remedy this inconvenience in part, an illegal cuſtom had been introduced of backing warrants, the Magiſtrate of one county endorſing the warrant of the Magiſtrate of the other. To legalize this practice, the ſtatute 24 Geo. II. ch. 26, was made.

But as this extended only to perſons eſcaping, and alſo omitted to give a power of bailing to the ſecond Magiſtrate, the Legiſlature conſidering, that crimes might iſſue as it were from one county, and be propagated into another, and there take and complete their ſole or full effect, where, perhaps, the offender in perſon might never have been; added to the words of the former act, which provided for the arreſt of perſons *eſcaping* or *going into* another country, the words, or who ſhould there *reſide* or *be*, all this will appear by reference to the words of the acts themſelves.

Thus matters ſtood when it was obſerved, that ſtill the caſe of a perſon eſcaping, *going* into, *reſiding*, or *being* in Scotland, and having committed in perſon, or by tranſmiſſion of his crime, an offence in England, was not provided for; though Scotland had been united with England; the ſtatute 13. Geo. III. ch. 31. was therefore made, providing for that caſe as well as for the mutual event of perſons committing offences in Scotland eſcaping, going into, reſiding,

or being in England; the power of bailing the perſon arreſted, however, was not given, for this plain reaſon, that the law would not entruſt a common Magiſtrate in Scotland with the power of determining or judging, whether an offence was bailable in England, nor *vice verſa*; nor if it had entruſted to him ſuch power, can it be imagined, where or how the recognizance of bail could be returned?

From the ſeveral ſtatutes, the preſent ſtatute 44th of the King was formed; and ſurely knowing the objects and intentions of thoſe ſtatutes and its component parts, we cannot be at a loſs to know the object, the ſcope, and the nature of the compoſition; it was to put Ireland and England on the ſame footing and relation with reſpect to each other that any one county in England had been to every other, as far as the nature of things would admit, which was found as in the caſe of Scotland, not to extend to the admiſſion of bail of perſons charged with offences, until they had been tranſmitted to the country where they were to be tried.

Having thus far argued from the intention and ſcope of the Legiſlature, and the acts from which the preſent is derived, I proceed to ſupport my conſtruction of this ſtatute:—from the very plain words which it contains, it puts four caſes—*eſcaping, going, reſiding, being*: the words are, *if any perſon againſt whom a Warrant ſhall be iſſued*, as therein, for any crime or offence againſt the Crown of England or Scotland reſpectively, ſhall *eſcape, go into, reſide*, or *be in any place of that part of the United Kingdom called Ireland.* The Legiſlature meaning by the firſt caſe, an eſcape by a perſon conuſant of the warrant having iſſued; by the ſecond, his going into the other country on account of buſineſs, or pleaſure, not acquainted with the iſſuing of the warrant, nor flying from it; the third, the caſe of a perſon reſident in Ireland, who might, or might not, have been at ſame time previous in England; and fourthly, the Legiſlature recollecting, that a perſon neither eſcaping nor going from England, or Scotland, nor a regular reſident, nor having a fixed domicile in Ireland, *might happen* to be there, included this caſe alſo; and thus all the words of the ſtatute have their plain and reſpective diſtinct meanings. The two latter words, therefore, *reſide*, or *be*, are not ſuperfluous; but it is ſaid according to our conſtruction, the two former would

be

be ſo. We may retort the argument and ſay, according to your conſtruction, the two latter would be ſo.

But it is ſaid, the two latter words refer to the caſe of going from one country to the other before warrant iſſued; the two former to going after warrant, admitting, that they refer to a caſe before warrant iſſued; it is not confined to perſons going to, but in general to perſons *reſiding* and *being* in the other country before warrant iſſued. According to this conſtruction, therefore, the latter words are not ſuperfluous; but even, if according to our conſtruction, the word *reſide*, or the word *be*, would have been ſufficient, no ſtable argument can hence be drawn, inaſmuch as it would only follow, that the Legiſlature had too ſervily copied the language of former acts, and diſtinguiſhed what needed no diſtinction: and as to the ſuppoſition of a diſtinction between caſes before and after warrant, thoſe words though uſed in the Engliſh acts of Geo. II. are in the preſent act totally omitted, and cannot apply. If the words then are plain, what is to check or controul them? Why, it is ſaid, the word ESCAPE only is uſed. It may be obſerved, that this argument excludes perſons *going into*, and who could not properly be ſaid, to *eſcape*, and it might be anſwered, that *eſcape* might here have been uſed, and in its vulgar ſenſe, and in the language of converſation, for any *evading* of juſtice, though not by actual flight; and that if we look to preambles, we ſhould look to the general preamble of the whole ſtatute, and not to particular clauſes. But the better anſwer is, that it is a well known rule of law, that however a preamble may tend to illuſtrate doubtful words, it never can controul or alter an enacting clauſe, couched in plain terms; and ſuch I inſiſt this to be. This principle of law is moſt clearly laid down by the greateſt Judges: Lord Hardwicke, in the caſe of Baſſet, *v.* Baſſet, 3. Atkyns, p. 205, where he adds, that if enacting words can take in the miſchief intended to be remedied, they ſhall be extended to it, though the preamble doth not warrant it; and in Robinſon's caſe, 2d Eaſt's Criminal Law, pages 1110 and 1113, Judge Buller ſays, when the enacting clauſe refers only to ſuch offences as are mentioned in the preamble, it may thereby be controuled and reſtrained; but here it would be doing violence to very plain words, and repealing obvious proviſions of the ſtatute. So I ſay here, Judge Buller

truly adds, that it is no uncommon thing for a ſtatute to recite a particular miſchief, as the cauſe of making it, and yet for the enacting part to embrace more general objects, and to extend to other caſes, which the Legiſlature thought within equal miſchief.

But it is ſaid, that even ſuppoſing that the ſtatute is not limited to eſcapes, and doth not reach offenders inferior to felons, and that the ſtatute ſpeaks only of felons and other malefactors, and that the author of a libel, is not a malefactor in the legal ſenſe.——Mr. Curran has defined a malefactor to be a man who commits ſome groſs violation of public duty: Is not a libeller ſuch a man? but I define it an evil-doer; it is the literal Engliſh of the word, and includes all offenders; and accordingly Mr. Juſtice Blackſtone, in his 4th volume of his Commentaries, ch. 21, p. 292, in the 12mo edition, tranſlates it by the word OFFENDERS, when ſpeaking of the act, 13th of the King, relative to Scotland, above mentioned; and I add, that unleſs it be ſo conſtrued it is uſeleſs, and the word felons would do; whereas it is plainly uſed in contra-diſtinction to felons: let me here obſerve too, that the ſtatute is ſaid not to extend to conſtructive offences. This is not a conſtructive offence.

The next argument is, that according to our conſtruction of this act, it repeals the Habeas Corpus act, which never would have been intended, and therefore our conſtruction is falſe. To try this argument and the truth of it, trace and examine the origin and progreſs of the Habeas Corpus act, and the miſchief it was intended to remedy, and it will immediately appear how totally inapplicable the facts relative thereto are to the preſent caſe; we ſhall find the miſchief recited ſo early as the reign of Queen Elizabeth, when the Judges addreſſed the Chancellor and Treaſurer, ſtating, that divers perſons had been impriſoned for ſuing ordinary actions, and when writs were directed to the perſons impriſoning them, have been removed to ſecret priſons, ſo that the Court could not learn to whom to direct the writs.

In the reign of Charles the Firſt, the evil had grown to an enormous height.—Mr. Stroud, Mr. Hollis, Mr. Selden, and other men of juſtly celebrated fame, were impriſoned for freedom of ſpeech in Parliament; they applied for

for a Habeas Corpus, and the Judges of the King's Bench were of opinion to grant it; when, behold, they could not be found! the King had removed them to the Tower by his own authority; and, when the Court applied to him to know what was become of them, the King anſwered, that having been very impertinent to him, and alſo, as he underſtood, to their Lordſhips, he had thought proper to prevent their having the benefit of the Habeas Corpus, a privilege founded on Magna Charta.—See Stroud's caſe, 7. State Trials.—Theſe crying grievances called firſt for the Petition of Right, and afterwards for the famous Habeas Corpus act, 31 Car. ch. 2. which enacts, "that for preventing illegal impriſonments beyond the ſeas, no ſubject ſhall or may be ſent to Ireland, Jerſey, Guernſey, &c. &c. provided always, that if any perſon or perſons, at any time reſident in this realm, ſhall have committed any capital offence in Scotland or Ireland, or in any foreign plantation, where he ought to be tried, ſuch perſon may be ſent to ſuch place to receive his trial, in the ſame manner as might have been uſed before the making of this act."

What was the evident intention of this act?—Not to ſcreen crimes; not to give general impunity for offences; not to encourage any man to do wrong, or to injure his neighbour; not to promote licentiouſneſs; but to protect real liberty, and to prevent illegal impriſonment.—Who were the framers of this act?—The moſt true and real patriots who ever were in England; the men who firſt and vigorouſly oppoſed the encroachments of Charles the Firſt; and when they found the King complying with reaſon, and willing to ſacrifice all his prejudices to the truth of the Conſtitution, fought and bled in his defence, againſt the violence of republicaniſm. Such was Lord Falkland, and ſuch was Lord Clarendon. And were all theſe noble ſtruggles for the glorious liberty of doing miſchief? How would theſe illuſtrious men have ſpurned at ſuch an explanation? How would they have repelled ſuch an inſinuation? How would they have lamented this perverſion of Liberty, and of its moſt adored inſtrument, the Habeas Corpus act? How would they have exclaimed, did we ſacrifice our time, our peace, our property, our lives, in ſupport of the Conſtitution, to be quoted as the inſtruments

ments of licentiouſneſs, and the patrons of virulence and of wrong?—Away with ſuch idle fancies, ſuch ſophiſtical abuſe of words!—They did not inſert miſdemeanors in the act, becauſe they did not think of excepting in the Habeas Corpus act ſuch a caſe. Will you believe, that if they had reflected on the poſſibility of ſuch a caſe as this, they would not have included it in the proviſo?—The preſent act includes miſdemeanors, and, in ſo doing, it doth not repeal the Habeas Corpus act; it only elucidates, and explains, and extends the real ſpirit of it—the name of the Habeas Corpus act is introduced in fallacy, to captivate the ear of liberty, and catch popularity in the lures of injuſtice.

The next arguments ſuggeſted are, *ab inconvenienti*, the party cannot be bailed until he lands on the ſhore of the other country, and therefore it is impoſſible the law ſhould extend to miſdemeanors;—the premiſes I admit, the conſequences I deny—I admit that the power of bailing in the county where arreſted is omitted, and omitted adviſedly, and upon conſideration; but deny that, therefore, miſdemeanors were not intended to be reached and included; an inference which might be fair, if the power of bailing was poſſible, but until it can be ſhewn to me where or how a recognizance of bail could be taken before tranſmiſſion of the priſoner, or how it could be returned, I muſt inſiſt upon its impoſſibility. Suppoſe the libel publiſhed in Cumberland, and the libeller reſident in Ireland, who is to take the bail, or in what manner is he to return the recognizance? Is he to ſend it by poſt to Cumberland? Is he to go with it himſelf? Who is the officer to carry it—and, if it were carried, who is the perſon, what the office there to receive it?—The framers of the act conſidered the feaſibility of this proviſion: the objectors to the act well know its impracticability.

It is obſervable, that the argument that this law doth not extend to bailable offences, is overturned by an underſtood proviſion in the act, that the party ſhall be bailable the moment he lands in England: and the hardſhip is mutual, for the Engliſhman, arreſted for a libel publiſhed in Ireland, could not be bailed until he landed here; and, even if this omiſſion of bailing in the country where arreſted,

arrested, were owing to accident, and not to design, we must obey the law until corrected. Arguments from inconvenience cannot subvert positive law. But what hardship, or what inconvenience, can the defendant here complain of? An offer was made to him, and he was even requested to give bail, with an earnestness to accommodate him, perhaps not altogether supported by the powers of the act; but if an excess, an excess of benignity, of which surely the person favoured cannot complain.

But, say my learned opponents, what a grievance is this? They declaim with infinite pathos on the hardships thus imposed upon the offender: but doth he not bring this hardship upon himself? Can he complain of mischiefs of his own creating? Had he kept his tongue from evil speaking, quietness and peace would attend his habitation, and spread the curtain of security over his dwelling. Shall the man who sends forth his poisoned arrow be angry if it rebounds and wounds himself? Shall he who troubles the waters complain that he is swallowed in a vortex of his own creation? or shall we pity the man, who, from his rocky promontory, aiming a deadly blow at the man who never offended him, loses his balance, and is projected into an ocean of distress? He pitied not others, shall he himself have pity?—I speak not of the present case—I speak not of any particular case.—I argue on possibilities, on general reasoning, on notorious and analogous facts.—This hardship, which is said to render our construction impossible, actually existed between Cumberland and Cornwall, between any two counties in England, down to the 23d year of the reign of George the Second.

The powerful oratory of my opponents still rests on the imagined case of a man dragged to Scotland, a country governed by different laws, by laws of uncommon severity, by laws to him unknown. Hard it may be—but let him then, if the laws of Scotland be additionally severe, be more particularly careful not to invade them; let him remember the motto of the country, *Nemo me impune lacessit*; and let him reflect on his argument and his claims. What is it? Give me free liberty to offend in Scotland; permit me to set every man in Edinburgh against his neighbour; allow me to disturb the peace of all the families in Scotland whom

whom I chuſe to devote to unprovoked inſult and abuſe, becauſe, forſooth, the law of Scotland is ſevere and unknown to me; and let me proclaim to every malicious man in that country, that he may with impunity attack any of his countrymen, by coming to reſide at Belfaſt.

The next cry, addreſſed by deception to ignorance, is, this is an *ex poſt facto* law. For lawyers, ſurely, it cannot be intended.—Is any legal man ignorant that an *ex poſt facto* law is that which puniſhes for a deed previouſly committed, and only made criminal by the law itſelf? Doth the preſent act, for the firſt time, make libel a crime? It alters and regulates the mode of apprehending the criminal. And what ſays the perſon charged—"Really, I am injured; for, though I may have committed the offence, I relied upon it, that I could not be caught; and, indeed, you have done me a mighty grievance by pointing out a new method of getting me. It is not fair! Why did not you tell me of this before?"—Is not this too ridiculous to require an anſwer?

Mr. Johnſon has ſuperadded to the arguments advanced by other gentlemen others more ingenious than ſubſtantial. Without dwelling on the ſpecious ſubtlety, that the words no *ſufficient* proviſion ſhew, that the act was not intended for a caſe for which there had been *no* proviſion (a technical objection which would ſcarcely occur but to lawyers—often as apt to ſmile inwardly at their own inventions as to produce them). I haſten to his aſſertion, that no man can be affected by any offence againſt the laws of a country where he never reſided. Your Lordſhips have deſired me not to loſe time on this poſition, intimating, that it hath not weighed with you; yet I cannot help putting this caſe:—Suppoſe a man in Ireland contrived, by the intervention of an innocent perſon, ignorant of the contents, to ſend a box of poiſon to his private enemy, a *Frenchman*, at *Bourdeaux*, to whom his hatred had commenced in Ireland, he himſelf never having been in France, would he not be tried for murder here? or if untried, he was afterwards found in France, could he not be tried for murder there? He is evidently a principal—not an acceſſory. Is he never to be accountable, except to the tribunal of Heaven?

But,

But, ſaith the learned Counſel, an acceſſory to a felony could not be tried in England, and a *fortiori*; when ſuch a ſtrong caſe is omitted, petty miſdemeanors we never can believe to be included; the legal doctrine as to offences committed out of the realm, and as to acceſſories, muſt be traced through the different acts. By ſtat. 33d Henry VIII. ch. 23, in England, murder committed out of the realm might be tried there; 35th Henry VIII. provided as to treaſon committed out of the realm (ſee 2 Hawkins, alſo, 444—and 1ſt Eaſt's Criminal Law, page 369). The 2d and 3d Edward VI. Engliſh, and 10th Charles I. chap. 19, Iriſh, provided for a wound at home and death enſuing from it abroad; as it doth, alſo, for the trial of acceſſories at home to offences committed abroad. Upon the whole, it is true, that an acceſſory in Ireland to a felony in England, who had never been there, could not there be tried; though by the Iriſh ſtatute 10th Charles I. chap. 19, he may be tried here. But how doth this apply to the preſent caſe? This hath been called an acceſſorial offence. In miſdemeanors there can be no acceſſories; but if there could, I ſhould be glad to know who is the principal here? Was it the poſt-rider, the mail-driver, or the friend who may have carried the libel to England? Is it not evident that there can be no acceſſory here diſtinct from the principal? The reaſon, ſays the learned Counſel, why the acceſſory in Ireland to a felony committed in England cannot be tried in England is, becauſe he never was ſubject to the juriſdiction of England. No, that is not the reaſon: the reaſon is, becauſe he never committed any offence in England; the principal offended in England, but the acceſſorial offence was committed in Ireland, and there only. But how doth that apply to the preſent caſe?—the offender here is a principal, and the offence, viz. the publication of the libel, committed in England.

And here I cannot but ſmile at a minor argument which has been hazarded: that as the priſoner muſt be either remanded or diſcharged, if you have any doubt, he muſt be diſcharged; for that it cannot be ſaid to be a deciſion *per legem terræ*, if you have any doubt. Do my learned friends mean, that every judicial deciſion which is alloyed by the ſmalleſt grain of doubt is void by the *lex terræ?* What infallible Judges do they look for!—what infallibility do they

promiſe if ever in that ſituation!—what happy dogmatiſm!—what undoubting confidence do they ſuppoſe in the Judges of the land!—how diſgraceful to Lord Mansfield and Lord Hardwicke to have doubted ſo often as they did!——It reminds me of the happy ſatisfaction in his own knowledge enjoyed by a foreign prieſt, who, to a friend of mine diſcourſing with him on free-will, fix'd-fate, foreknowledge-abſolute, anſwered, *hæc omnia tibi facillime explicabo*; but my friend declined his kindneſs.

I have now diſcuſſed all the arguments of my learned opponents which I find on my paper; and they are too well uſed to laugh themſelves, to be angry with me for a little riſibility, when I review the remainder of my abſtract of what they have ſaid (ſomewhat reſembling the broken memorandums which Addiſon hath given us in the Spectator, of projected eſſays); biſhops and petticoats, valets and miniſters, *maxima quæque domus*, and *nil admirari*, together with a ſplendid declamation on the abuſe of time, are ſhort ſpecimens of topics which have amuſed the ear, without being even intended to affect the judgments.

Quotations indeed from the claſſics—rich and abundant quotations from the claſſics I do find, poſſibly rather too thickly larded; and, perhaps, I might ſay, *Io anche ſono pittore*; but were I a college man, in my turn to cap verſes, I ſhould be ſaid, as Smollet ſays of Addiſon, to come down with my ſatchel on my back; and I could not boaſt like my learned friend, *omnis auſtippum decuit*.

Before I conclude I muſt remark the hardſhip which has been put upon the replyer by the varying and fugitive nature of the defence:—In another Court, the learned Judge who gave his opinion ſo ably in favour of the Defendant relied upon the ſtatute relating only to eſcapes, but rejected with decided ſlight the argument that it did not extend to miſdemeanors; and in this Court no two gentlemen ſeem to have agreed upon the ſame grounds, nor any one to have adhered long to that which he originally choſe for himſelf: one ſays, that it doth extend to perſons guilty of miſdemeanors if fugitive, not otherwiſe; another, that it doth not extend to miſdemeanors at all; and a third, who began the conteſt, admits, that the literal ſenſe of the words

words include this case, but that the sound construction o the statute excludes it, and that locality of person, not of offence, gives jurisdiction (a doctrine certainly perfectly new), and that his offence may be transmitted innocently if not accompanied by himself.

Much has been said of the origin of warrants by Secretaries of State, and Lord Camden's argument in Entick *a.* Carrington, and of Lord Sanquhar's case, 9th Coke; how they apply to the present case it is not easy to conceive. I shall only note the Irish act, 6th George I. chap. 12, in which the warrant of any Judge of the King's Bench in England to apprehend an English felon in Ireland, backed by the authority of the Lord Lieutenant here, is recognised as legal; and as to Wilke's case, there never was such a perversion of an authority, *ad captum vulgi.* Wilkes, a Member of Parliament, was called upon, not to stand a trial, nor to give bail to stand a trial for a libel, but to give securities for keeping the peace; and it was determined, that a libel not being a direct breach of the peace, he was not bound to give such sureties; and hence it has been most sagely argued, that no bail is required for a misdemeanor. Need I be more diffuse on this topic, *verbum sapienti?*

I come, in the last place, to the affidavits which have been made upon this occasion, and properly made, as they do not controvert the return:—It is observable, in the first place, that they do not swear to innocence, but chiefly insist that the trial for the libel might have been in Dublin: it is observable, also, that they do not identify the libel published here to have been the same which was published in London. But supposing that it was the same, and that it might have been tried here, without dwelling on a severe, but true remark, that this would be sheltering a man under the multiplicity of his offences, I ask, is the offender (where he may be tried in two places) to select which he chooses? is he, perhaps, to select that in which he cannot be convicted? and is he to determine in what manner the prosecution shall proceed with least hopes of success? The publication in England is easily proved; the fact of putting it in the post-office, or otherwise transmitting it from Ireland, it may be impossible to prove. The publication in England must have been voluntary—the republication in Ireland may have been against the will of the writer.

I have thus, my Lords, endeavoured to do my duty, certainly a very painful one, to the beſt of my power. I am fully ſenſible, however this buſineſs may terminate, that the Bench and the Bar of Ireland will long have cauſe to rue it. I have endeavoured to abſtract the caſe from the individual, and to argue it as an abſtract point of law. The learned Judge muſt know, that I can bear no perſonal hoſtility to him—we have been long neighbours and acquaintances—his family and relatives and mine in habits of intimacy and friendſhip. I ſincerely hope he is innocent of a libel on the firſt, moſt illuſtrious, and moſt amiable character in the land, which I muſt call abominable and atrocious. I ſincerely hope, that it is impoſſible he ſhould, in his high ſituation, unprovoked, compoſe ſo ſcandalous a libel; and with the benignity of the law, I have a right to conſider him as innocent until he be found guilty.

Conſidering, then, the queſtion as an abſtract and general one, and removing entirely from the mind the conſideration of the individual, let me conjure your Lordſhips to conſider the conſequences of ſuch an expoſition of the ſtatute as that for which the Defendants Counſel contends—let me entreat you not to elevate a ſignal of impunity to offenders—to make Ireland a receptacle of crimes. Do not make this country like one of the cities of refuge of the children of Iſrael—the haven and harbour to which iniquity ſhall fly for protection—and the favourite reſidence of malice and revenge. Do not make this Court the altar and the ſanctuary to which criminals may cling, as of old they were impiouſly ſuffered to do to the altar of Heaven! Do not convert this Iſland of Saints into an Iſland of Sinners; nor ſuffer it to be ſaid, that it contains no venom but that of man! Remember the ſacred dictate, Thou ſhalt keep thy tongue from evil ſpeaking and ſlandering;—and do not, like the careleſs editor of the bible, invert the ſacred commandment and proclaim, Thou ſhalt ſcandalize thy neighbour—thou ſhalt do it with impunity—and thou ſhalt be ſheltered under the canopy of the law.

[*Here the Arguments of Counſel cloſed on both ſides.*]

JUDGMENT OF THE COURT,

PRONOUNCED ON

THURSDAY, FEBRUARY 7th, 1805.

Baron M'CLELAND.

As there exists in the Court a difference of opinion upon this question, it falls to my lot to begin, and in the first instance, state my reasons for the judgment I shall give.

In this case a writ of Habeas Corpus has been issued out of this Court, to which a return has been made—and two affidavits have been made on the part of the prisoner: upon these documents taken together, he has by his Counsel moved to be discharged from custody.

[Here his Lordship stated the writ, the return, and the affidavits at considerable length.]

On these documents which I have stated, the motion for the discharge of Mr. Justice JOHNSON is founded, and on his behalf it has been contended, that upon the facts thus disclosed this arrest is illegal, as his case does not fall within the scope of the act of 44th Geo. III. c. 92. The question therefore to be decided by the Court, viz. the legality or illegality of the arrest and imprisonment, must depend upon the construction of that act of Parliament.

It has been contended on behalf of the prisoner, that on the true construction of this act, it cannot justify the present arrest, on two grounds,—first, that the act does not extend the power of arrest to cases of misdemeanors,—secondly, that even supposing it to extend to misdemeanors, yet it only authorises an arrest in cases where the person accused has been corporally within the jurisdiction of the Court where the trial is to be had, and has from thence escaped; but not to a case like the present, where the prisoner never was within the jurisdiction, except constructively.

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The firſt point, namely, that the act does not extend the power of arreſt to the caſe of miſdemeanors, has been ſupported by a conſtruction given to the particular words, in the 3d ſection of this act, and by arguments pointing out the hardſhips and inconvenience which would from extending its proviſions to miſdemeanors: for this purpoſe, that part of the preamble to that ſection is relied upon, in which it is ſtated, that felons and other malefactors "may make their eſcape;" theſe words are contended to apply to felons only; and it is inſiſted, that in the enacting clauſe, the word of reference *ſuch* ought to be introduced, and made to refer to the words felons and malefactors, as ſynonimous terms, and thereby to confine the operation of the enacting clauſe to caſes of felony:

To this argument there are two deciſive objections,—firſt, that the preamble does not warrant ſuch a conſtruction; and ſecondly, that if it did, the preamble could not controul the enacting clauſe, which, as to this point, is clear and explicit.

It has been ſaid, that the word malefactor is uſed in this ſtatute as ſynonimous with "felons," but, in my opinion, the Legiſlature, by the word malefactor, intended to include all perſons guilty of offences leſs than felony, and by the word felons, intended to include perſons guilty of felony and the higheſt offences. And, in this opinion, I am confirmed by recurring to the legal meaning of the word malefactor in the old ſtatutes—it is there ſynonimous with treſpaſſers; and it is a ſettled rule of conſtruction, that when the ſenſe and meaning of words and ſtatutes have been aſcertained, they are to be underſtood in the ſame ſenſe, when uſed in a ſubſequent ſtatute.

The ſtatute *de malefactoribus in parcis* 21ſt Edward I. and the conſtruction it has received, ſhew that malefactors and treſpaſſers are ſynonimous; therefore, in my opinion, the preamble does extend to miſdemeanors, and is not confined to caſes of felony, as has been contended for the priſoner.

But if there were any doubt of the meaning of the preamble, or if it even mentioned only "felons," ſtill the words of the enacting clauſe are ſo clear as to render it impoſſible

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to entertain a doubt upon them. The words are, "If any "perſon againſt whom a warrant ſhall be iſſued *for any* "*crime or offence* againſt the laws of Ireland, &c." Try the meaning of theſe words by this teſt, which I ſhall mention:—Suppoſe it were thought neceſſary to make a new act to include miſdemeanors, what other words could be uſed to expreſs that intention, more ſtrongly than the words "any crime or offence?" thus including every poſſible deſcription of a violation of the law. Theſe words are in fact as comprehenſive as if every offence in the criminal code had been enumerated.

Looking therefore to the words of the 3d and 4th ſections of this act, and applying to them the ordinary rules of conſtruction, I am clearly of opinion, that by theſe ſections, the power of arreſt is extended to the caſe of miſdemeanors. And this will appear ſtill more clearly, if we conſider how the law ſtood before the paſſing of the act, what was the miſchief to be guarded againſt, and what the remedy provided. At common law, no perſon could be legally tranſmitted from England to Ireland, or *vice verſa*, for trial, unleſs charged with a capital offence. In ſuch a caſe, the offender might legally be tranſmitted. This appears from the 16th ſection of the Engliſh Habeas Corpus act, which declares, that ſuch perſons might be tranſmitted, as might have been done prior to the act. The Legiſlature, thereby declaring, that ſuch tranſmitting of capital offenders was legal prior to that act, and was not to be affected thereby.

Such conſtruction of the Habeas Corpus act is recogniſed by all the Judges of England in Colonel Lunday's caſe, reported in 2d Ventris, 314—and in the caſe of the King v. Kimberly, 2d Strange, 848. So at common law, a Magiſtrate could not tranſmit a perſon from one county to another for an offence committed out of his juriſdiction, though upon examinations made before him, he might arreſt ſuch a perſon.

From this view of the ſubject it appears, that at common law, conſiderable difficulties exiſted as to the arreſting and tranſmitting offenders for trial from county to county, and from kingdom to kingdom. In the firſt, the arreſt was attended with inconvenience to the proſecutor, and the mode of

of tranſmitting was tedious, circuitous, and expenſive—in the latter, the power of arreſt and tranſmitting was confined to capital caſes; and there was no power of arreſt or tranſmitting an offender, charged with a miſdemeanor from one kingdom to another. Theſe defects in the criminal code called for Legiſlative interference, and accordingly theſe defects were remedied between county and county, in England, by the 23d and 24th of Geo. II. in which *it is admitted*, that miſdemeanors are included. The Legiſlature then went on to remedy the like defect, as between England and Ireland, as had before exiſted between county and county. In England, good policy required, that the two countries united into one kingdom ſhould bear the ſame relation to each other as the counties of the ſame kingdom did—and this was effected by the 13th Geo III. which gave, as between the two kingdoms the like remedy as had been before given to two different counties. According then to the rule of law, which obliges us to expound ſimilarly all ſtatutes made in *pari materia*, theſe ſtatutes ſhould be conſtrued all together; and as the 23d and 24th Geo. II. unequivocally extend to miſdemeanors, ſo muſt the 13th Geo. III. be held to extend to ſimilar offences; and in this opinion I am ſtrengthened by the direction of the 13th Geo. III. that when a perſon is brought from Scotland into England, he ſhall be taken before a Juſtice in the firſt Engliſh county, there to be dealt with according to the 23d and 24th Geo. II. that is to ſay, he ſhall be bailed if his offence be bailable, and if not bailable, he ſhall be tranſmitted to the priſon of his proper county—thus clearly including offences under felony, for which only bail may be taken. And from this, it is clear, that the object of the 13th Geo. III. was as I have ſtated, to extend as between kingdom and kingdom the advantages of the 23d and 24th Geo. II. The act now under conſideration, the 44th Geo. III. ch. 92, incorporated both theſe acts—the 23d and 24th Geo II. by its 1ſt and 2d ſection—the 13th Geo. III. by its 3d and 4th—and from the principle which I have laid down, muſt embrace the ſame claſſes of offenders with the acts from which it is clearly copied.

But in order to get rid of this irreſiſtible deduction, it is ſaid, that though the remedy is given between county and county in Ireland with reſpect to miſdemeanors, no ſuch remedy is given between kingdom and kingdom, and upon this

this extraordinary principle, that such offences are below the notice of her Legislature. Shall it then be urged, that the felon who commits the pettiest offence of larceny, is an object for the interference of the Legislature, and that the foulest perjury, the most mischievous swindling, or the most seditious libel, shall be below its notice, because those crimes, even though the latter should approach the boundary of treason, are only punishable as misdemeanors? Can it be supposed of the Legislature, that it could design to give impunity to such offenders? But so far from this argument being in favour of the prisoner, I think it powerfully against him—for if it be admitted (as it must) that the interference of the Legislature was necessary for the arrest of persons guilty of misdemeanors flying from one county to another, it follows, that such interference, as between kingdom and kingdom, was necessary a *multo fortiori*—for there was at common law a remedy though defective between county and county, inasmuch as a Magistrate might arrest, though he could not transmit or remove but by Habeas Corpus, while between kingdom and kingdom there existed no remedy whatever.

By the 13th Geo. III. the Legislature placed England and Scotland on the same footing as to the arrest of *all offenders* as two English counties were by the 24th Geo. II. excepting as to the right of giving bail; and so in my opinion does the 44th Geo. III. place the three districts of the United Kingdom on the same footing as Scotland and England stood under the 13th Geo. III. It has been greatly relied upon at the Bar, that the want of a provision to bail in this act is a proof, that it was not intended to extend to cases where the subject is entitled to bail at common law. It is true, that no such provision is made by the act; and if I could admit, that the enacting clause was doubtful or obscure, and that the omission of such a provision, were the intolerable hardships which has been stated at the Bar, perhaps I might yield to the construction desired; but when the language of the act is as clear as language can be, when the words are for "any crime or offence against the laws of "England or Ireland respectively," I am bound to consider misdemeanors to be included, even though such hardships should follow; for I am bound, as a Judge, to construe the law as it is, and not as I might think it ought to be.

Let us conſider what was the relative ſituation of England and Scotland, as to criminal juriſprudence, when this act, the 13th Geo. III. was paſſed—the criminal code in each varying in almoſt every eſſential particular, ſo much ſo that even the profeſſors of the law in one country could not pronounce an opinion on the criminal law of the other. Could then a prudent Legiſlature conceive, that an Engliſh Juſtice of the Peace could be endowed with that knowledge of the law of Scotland, as to decide when a man was to be bailed or not, when if he aſked the Chief Juſtice of England for advice, he would probably anſwer, he could not give an opinion on the point? or would the Engliſh Legiſlature truſt the power of bailing to a Scottiſh magiſtrate, inſtructed only in a criminal code, arbitrary and ſevere, compared to the Engliſh code? Might not the Legiſlature fairly preſume, that a Scotch magiſtrate might refuſe to bail in a caſe where bail might be taken, and thus might have ſent a man a priſoner from Scotland to Cornwall; whereas, if the power of bailing were reſerved for the Engliſh magiſtrate (as it is by the act) he would be bailed in the firſt Engliſh county he would reach—Cumberland or Northumberland? Thus, by deferring the time of giving bail, until the arrival of the priſoner in the county, againſt whoſe laws he had offended, and before magiſtrates acquainted with thoſe laws, all theſe ill conſequences are avoided.

If this view of the ſubject be conſidered I think it will appear, that the Legiſlature could not have readily given the power of bail by the 13th George III. otherwiſe than they have done; and on thirty years experience no change has been thought neceſſary. When the Legiſlature came, in the 44th George III. to extend this act to Ireland, and to make its benefits coextenſive with the three diſtricts of the empire, the ſame reaſon ſtill applied as to Scotland; and, therefore, as between Ireland and Scotland the ſame impoſſibility of rationally giving the power of bail continued, the ſame reaſon as between England and Ireland does not prevail. But as thirty years experience had not furniſhed an objection to the practice under the 13th George III. it is not unreaſonable to ſuppoſe the Legiſlature thought the ſame rule a wiſe and a ſafe one as to England and Ireland, and that no great indulgence was due to an offender who had either fled from juſtice, or who had committed a crime

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by ſecret agency within a juriſdiction, and yet kept himſelf aloof from its ordinary proceſs. But it has been urged, that while the Legiſlature ſuppoſed ſuch an ignorance of the laws of the different countries in the magiſtrates of each, it is hard to believe that it would ſubject to the laws of the other country a perſon reſident in his own, and conſequently ignorant of the laws of that juriſdiction againſt which he ſhould offend; to which I anſwer, where a man offends by his corporal preſence, there can be no doubt that he is bound to obey the laws which protect him; and when he offends by agency, from the moment that his miſconduct paſſes the threſhold of the other country, the well-known principle of the law, *ignorantia legis non excuſat*, attaches upon him.

But the climax of this objection is, that by this conſtruction, the 44th George III. repeals the Habeas Corpus act. When I firſt heard this obſervation I own I was ſtartled, as I felt that it was not an ordinary queſtion, but one of vital importance to the law and conſtitution. However, in my mind, the moſt ſatisfactory anſwer can be given to it:—In the firſt place, even if it did virtually repeal that act, I ſhould feel myſelf bound by the clear, explicit, and unequivocal wording of this act, to perſevere in this conſtruction. But I am happy that I am not called upon to perform ſo painful a taſk as to decide, that the Habeas Corpus act is repealed or materially affected by this act.

The two great evils which the Habeas Corpus act ſought to remedy were, firſt, the delay of returns to writs of Habeas Corpus, whereby the King's ſubjects were unjuſtly detained in priſon for illegal cauſes—and, ſecondly, where perſons were illegally arreſted and ſent into priſons beyond the ſeas. It cannot be pretended, that this caſe falls within the firſt claſs of caſes remedied by the Habeas Corpus act; here there is no delay of return of this writ; and the party has had the opportunity of inſtantly and amply diſcuſſing the legality of his arreſt.—But we cannot bail him;—true, but the moment when he ſhall arrive in England he will be entitled to give bail for any miſdemeanor charged againſt him by the laws of England, and there he will have the benefit of the Engliſh Habeas Corpus act. But is he in a worſe ſituation thereby than a perſon arreſted under the 23d

of George II. would have been, that act having made no proviſion for bailing between country and country?—yet that act never was held to be a repeal of the Habeas Corpus act.

Under the 23d George II. or prior thereto, a magiſtrate could not bail a perſon arreſted in his county for a miſdemeanor committed in another county.—Under the 23d George II. the perſon arreſted for the miſdemeanor, was tranſmitted by the magiſtrate to the proper county, and prior to that ſtatute he was tranſmitted by Habeas Corpus. Was there any alarm or outcry againſt this kind of impriſonment from the year 1679, when the Engliſh Habeas Corpus act was paſſed, until the year 1750, when the 24th George II. was enacted? or did it enter into the head of any man during that period to contend, that the Habeas Corpus act was infringed, by arreſting a man for a miſdemeanor, by a magiſtrate who could not bail, and tranſmitting him to a county where he could be bailed? And yet what is this caſe but tranſmitting from diſtrict to diſtrict, inſtead of from county to county? and if any delay ſhould occur in ſuch progreſs, the party arreſted could be relieved by writ of Habeas Corpus, as appears by the caſe I have already quoted from Strange's Reports. And I think it equally clearly appears, that this caſe does not fall within the ſecond claſs of grievances remedied by the Habeas Corpus act. The preamble of the 12th ſection of the Engliſh Habeas Corpus act ſtates the evil to be thereby guarded againſt, "the illegal impriſonments of perſons in priſons beyond the ſeas." Now can it be ſeriouſly contended, that ſending the perſons in this caſe to England, for the purpoſe of trial, to a place where, under this very act, he muſt be bailed, is a repeal of the Habeas Corpus act?

On the whole, therefore, I am clearly of opinion, this act, the 44th George III. in the 3d and 4th ſections, extends the power of arreſt to caſes of miſdemeanors. And this opinion I form, not merely from the clear and explicit words of the ſections, but alſo from the ſpirit, intent, and object of the act. And in this part of the caſe I underſtand I am fortified by the unanimous opinion of the Court of King's Bench.

I now

I now come to the ſecond objection made to the legality of this arreſt, viz.; "That the 44th George III. (ſuppoſing "it to extend to miſdemeanors) is confined to breaches of "the peace by actual preſence, and where the perſon by "quitting the juriſdiction evades puniſhment;" and this conſtruction is contended for, as well in the caſe between county and county as between kingdom, or to ſpeak more correctly, between diſtrict and diſtrict. It therefore becomes neceſſary to take a review of the acts relating to counties, as well as thoſe relating to diſtinct kingdoms:—The firſt act is the 23d George II. cap. 24, ſect. 11.

[Here his Lordſhip read this ſection of the ſaid act.]

I am willing to admit, that this act confined the power of arreſt to caſes where the offender had changed his ſituation from one county to another, which is expreſſed by the words "eſcape and go into;" the one meaning a flight to avoid arreſt—the other a change of place without any ſuch intention; and this ſhews, that even in this act the enacting clauſe extended beyond the preamble, which is confined to the caſe of *eſcape* only.

The firſt view of this act ſhews it was inadequate to remedy the defects exiſting.—What were theſe defects in the criminal code as to this point? By the limited juriſdiction of Juſtices of the Peace, their powers were confined to the limits of their counties: the criminal, if beyond ſuch limits, was not within their reach. If the magiſtrate of the county where the criminal might happen to be was called on to act, with reſpect to an offence committed in another county, it muſt have been on informations ſworn before him, which was grievous to the proſecutor, as it required him to travel to, perhaps, a diſtant county; and when by ſuch examinations the magiſtrate was empowered to act, he could arreſt the perſon; but in miſdemeanors he could not bail.

How were theſe obſtacles to public juſtice to be removed? By giving the magiſtrate the ſame power and authority in *all* caſes over an offender found in his county, as if the crime had been committed in that county. I ſay in *all* caſes, as well where the criminal had never changed his ſituation as where he had; for no man can ſeriouſly conceive, that the object,

object of the Legiſlature was (as has been contended) to puniſh the crime of flight—no; the object was to puniſh the offender for the original crime charged againſt him.—Beſides, it is admitted, that a man who left a county, ignorant of any charge againſt him, may be legally arreſted in any other county. Now, I would aſk, is it not equally within the object of theſe acts to have the power of bringing to juſtice a man who has never changed his reſidence, and who may yet have been, by ſecret agency, guilty of the foulest crimes in a diſtant county, as to have the power of arreſting a man in a diſtant county, who may have gone there on his lawful occaſions, totally ignorant of any charge exiſting againſt him in the county which he has left? And, therefore, if the words of the 24th George II. and the two ſubſequent acts, viz. the 13th and 44th George III. will bear ſuch a conſtruction, I am bound to give them ſuch conſtruction; as by ſo doing, the attainment of juſtice is effected, and the defects of our criminal code removed which prevented the trial of offenders and granted impunity to criminals.

Let us now ſee how far the 24th Geo. II. cap. 55, effected this purpoſe.—[Here his Lordſhip ſtated the ſaid act at large.]—Now, in my opinion, the enacting clauſe is clear and explicit, and ſufficient to remedy all theſe defects which I have pointed out.—In the firſt place, the words, "*any* "perſon or perſons againſt whom a warrant ſhall iſſue," are general, and not confined by any word of reference to the preamble.—Then the words, *eſcape, go into, reſide,* or *be,* ſhould each receive, if they will admit of it, a definite and diſtinct meaning, ſo that none of them ſhall appear to be uſeleſs or ſuperfluous.—The word *eſcape* I conſtrue to apply to caſes where the offender flies from the county where he is accuſed, with a knowledge of ſuch charge, and to evade trial.—The words *go into,* I conſtrue to apply to the caſe of a man who leaves the county where he has been charged, ignorant of that charge, and goes into the other county on his lawful occaſions.---The word *reſide,* I conſtrue to apply to the caſe where a man has neither eſcaped, or gone into the country where he is arreſted; but where he has permanently reſided in that county, and yet has, by agency and procurement, committed a crime in another county.---The word *be,* I conſtrue to apply to caſes where the

the offender, without having either escaped, or gone into the county where he is arrested from the county where the crime was committed, and without residing permanently in the county where he is arrested, yet happens to *be* found in such county; having by procurement committed a crime in another county, where he was actually present:—As if, in this case, Mr. Justice JOHNSON had been arrested while on a visit to the county of Wicklow, or while passing through it; in that case, he had neither *escaped* from Middlesex, where the crime was committed; nor had he *gone into* Wicklow from Middlesex; nor did he *reside* in Wicklow; but he was found there, and therefore might properly be said to *be* there.

Now what is the construction given to those words, *escape, go into, reside, or be*, by the Counsel for the Prisoner? They contend, that these words can only apply to cases where the offender has actually left or fled from the county where the crime has been committed, and has gone into the county where he is arrested. And, to support this construction, they say the clause should be read thus—If any person shall escape, or go into, or having escaped, or gone into another county, shall reside, or be there.—Now, it is manifest, that by this construction, the words *reside* and *be* are utterly nugatory and superfluous; for, if the clauses are only to apply to the case of offenders who left the county where the offence is charged, and who have gone into the county where arrested, then the *words* escape and go into were sufficient to attain that object, and the Parliament might have been content with these two words only, as it was when it passed the 23d Geo. II. in which the words *reside* and *be* do not occur.—And the Counsel for the Prisoner feeling that this construction obviously rendered the words, reside and be, utterly nugatory, endeavoured to give them some meaning; and what was this explanation of them—this extraordinary one?—That the words *reside* and *be* were introduced to mark the extent of the magistrate's jurisdiction, and that he was not to execute the warrant so indorsed beyond his county.

But that such cannot have been the reason for introducing the words, *reside* and *be*, is manifest from this, that the subsequent part of the section expressly directs the magistrate

trate to execute the warrant only in the county where it is indorsed.---Thus, it is manifeſt, that by the conſtruction contended for by the Priſoner, thoſe importants words, *reſide and be*, are made nugatory and ſuperfluous, and are literally expunged from the ſtatute; whereas, by the conſtruction I have given to theſe words, each word is made to expreſs not only a diſtinct meaning, but is made deſcriptive of a diſtinct claſs of caſes.---And, by this conſtruction, is only not verbal criticiſm ſatisfied, but what is much more important, the great object of the Legiſlature, the great object of public policy, is attained, viz. the removal and annihilation of the ancient obſtacles, which prevented the trial of offenders in many caſes, and gave impunity to crime.---Such a conſtruction is, therefore, not only legal, but, in fact, coercive on a Judge.

But it has been contended, that, by the preamble to the 24th Geo. II. the enacting clauſe is to be confined to eſcape either *before* or *after* warrant granted.---But, I deny that the preamble can in that act controul in ſuch way the enacting clauſe. No preamble can do ſo except in two caſes--1ſt. where by words of reference the preamble is made part of the enacting clauſe;--2dly, where the enacting clauſe is obſcurely framed, and then the preamble is reſorted to as a means of diſcovering the meaning of the Legiſlature. Now, this ſtatute does not fall within either of theſe caſes; for in this enacting clauſe there are no words of reference to the preamble. Nor is the enacting clauſe obſcurely framed; nor does it require any aſſiſtance from the preamble to aſcertain its meaning.

From the manner in which this argument has been uſed by the Priſoner's Counſel, it would follow that nothing ſhall be deemed to be enacted by the ſtatute beyond the limits of the preamble.---If this were the rule, what would become of bail given to the magiſtrate by this act?---It is not mentioned in the preamble, and yet it is obvious that it muſt have been one great object of the Legiſlature in paſſing this act. That the rule is as I have laid it down will appear from the caſe of the King a. Robinſon, 2 Eaſt. C. Law, 1113.

In

In that cafe, Mr. Juſtice Buller, in delivering the opinion of the twelve Judges of England, uſes theſe words, "Where the enacting clauſe of a ſtatute refers to ſuch of-"fences only as are mentioned in the preamble, it may thereby "be controuled or reſtrained. But in that cafe it would "be doing violence to ſome very plain words, and repeal-"ing ſome of the obvious proviſions if it were ſo re-"ſtrained. It is no uncommon thing for a ſtatute to recite "a particular miſchief as the cauſe of making the ſtatute, "and yet for the enacting part of it to embrace more ge-"neral objects, and to extend to other caſes which the "Legiſlature thought within equal miſchief."---So, in this caſe, I would ſay in the words of Judge Buller, the enacting clauſe does not refer to and connect itſelf with the preamble, and that to reſtrain the enacting clauſe in this caſe to what is ſpecified in the preamble, would be doing violence to very plain words, and repealing ſome of the obvious proviſions of the act.

There is a ſtill more modern caſe which, perhaps, even more accurately applies to this part of the caſe.---It is the caſe of the King a. Marks and others, 3d Eaſt's Reports, 157. That caſe came before the Court of King's Bench in England, on a motion to bail the priſoners on returns to writs of Habeas Corpus. The priſoners appeared to be charged with a felony under the 37th Geo. III. cap. 123. By the preamble of that ſtatute it was enacted, that, "Whereas divers wicked and evil-diſpoſed perſons have "of late attempted to ſeduce perſons ſerving in his Ma-"jeſty's forces by ſea and land, and others of his Majeſty's "ſubjects, from their duty and allegiance to his Majeſty, "and to incite them to acts of mutiny and ſedition, and "have endeavoured to give effect to their wicked and "traitorous proceedings, by impoſing on the perſons "whom they have attempted to ſeduce the pretended ob-"ligation of oaths unlawfully adminiſtered."---The ſtatute then enacted, among other things, that to *adminiſter any oath or engagement not to reveal or diſcover any unlawful combination or confederacy, ſhould be a capital felony.* It appeared by the examination returned with the writ, that the priſoners were charged that they, being journeymen ſhearmen to maſter clothiers, formed an aſſociation to raiſe their wages, and, in purſuance of ſuch conſpiracy, adminiſtered

niſtered an oath to one of their trade *to be true to the aſſociation, and not to divulge its ſecrets.* It was contended on that caſe, and with much more plauſibility than here, that as the preamble only related to oaths adminiſtered for the purpoſe of creating mutiny or diſaffection in his Majeſty's troops, the enacting clauſe could not be extended to a caſe ſo diſſimilar as that before the Court. But the Court held, that as there were no words of reference in the enacting clauſe to connect it with the preamble, and as the words of the enacting clauſe were general, that they included the caſe before the Court, and made it a felony. In that act the preamble profeſſed to deal only with oaths tending to promote mutiny or diſaffection in his Majeſty's forces, yet the general words in the enacting clauſe extended the penalty of even death to all illegal oaths. Shall it then be ſaid, that when the life of a man is at ſtake, the preamble ſhall be rejected, but that it ſhall be made to operate when it is calculated to clog the wheels of juſtice, to prevent the trial of an offender, and to give even ſecurity to crimes?

Having thus ſhewn what I conceive to be the true conſtruction of the 24th Geo. II. let us come to the next ſtatute in point of date, the 13th Geo. III. I have already obſerved, that in my opinion the object of the Legiſlature in paſſing this act, the 13th Geo. III. was to place Scotland and England in the ſame ſituation as to the arreſt of criminals as two Engliſh counties, except with reſpect to the power of bail. And, accordingly, in the 13th Geo. III. the Legiſlature uſes in the enacting clauſe the very ſame words that are uſed in the 24th Geo. II. viz. "if any "perſon againſt whom a warrant ſhall be iſſued ſhall eſ-"cape, go into, reſide, or be."—Theſe words muſt, therefore, receive the ſame conſtruction in the latter act as in the 24th Geo. II. according to the rule of conſtruction I have already laid down.

Having now commented on all the preceding acts, I come now to the act in queſtion, the 44th Geo. III.—This act had two great objects in view:—In the firſt place, to give Ireland the benefit of the proviſions of the 24th Geo. II. as between county and county; and, 2dly, to give Ireland the benefit of the proviſions of the 13th Geo. III. as between it and England and Scotland. The firſt object

object is attained by the 1ſt and 2d ſections of the act, and the ſecond object by the 3d and 4th ſections.—[Here his Lordſhip read the material parts of the firſt ſection of this act.]—The object of this 1ſt ſection was to give Ireland the benefit of the 24th Geo. II.; the preamble, then, in reciting the defects in the criminal code which were to be remedied by it, would naturally ſtate the defects which were removed in England by the 24th Geo. II.—that is, the preamble in the 44th Geo. III. would be as extenſive as the enacting clauſe of the 24th Geo. II. which I have already ſhewn is more extenſive than the preamble of the ſame act, viz. the 24th Geo. II.—Accordingly, we find, that the preamble in the 1ſt ſection of the 44th Geo. III. is entirely new, and differs eſſentially from that of the 24th Geo. II.—It further recites, that, "Whereas it frequently happens "that perſons againſt whom warrants are granted by "Juſtices of Peace in Ireland, eſcape into other counties; "*and it may alſo frequently happen that perſons having commit-*"*ted offences in ſome county in Ireland, may reſide or be in* "*ſome other county.*"—By this preamble the Legiſlature points out the two claſſes of caſes which had been remedied by the 24th Geo. II. and which were to be remedied as to Ireland by that act, viz. that claſs of caſes where the offender had eſcaped from or left the county where the crime was committed; 2dly, that claſs of caſes where the offender happened to *reſide* or *be* in a different county from that in which the crime was committed, without having changed his reſidence, or eſcaped from ſuch county.—By this important change in the preamble of the 1ſt ſection of the 44th Geo. III. from the preamble of the 24th Geo. II. I conceive the Legiſlature to have decided by a legiſlative conſtruction the extent of the enacting clauſe of the 24th Geo. II. and the diſtinct meaning of the words eſcape and go into, and reſide and be; for the preamble of the 44th Geo. III. ſtates a caſe as an object of remedy by the act, in which nothing like eſcape ever exiſted or happened, and it remedies that defect by the ſame words, *reſide* and be in the enacting clauſe as are uſed in the enacting clauſe of the 24th Geo. II.

In the 3d and 4th ſections of the 44th Geo. III. and which peculiarly relate to this caſe, the ſame enacting words occur as in the 1ſt ſection, with one addition which ſtill further ſtrengthens this conſtruction, and the diſtinct meaning

between the words escape, go into, and reside and be. I allude to the word *whither*, introduced into both the 3d and 4th sections, and which does not occur in the 13th Geo. III.—By the 3d section, (and so in the 4th) it is "enacted "that it shall and may be lawful for any Justice of the Peace "of the county, city, &c. &c. in England and Scotland "respectively, *whither* or *where* such persons shall escape, "go into, reside, or be, to endorse his name on such war-"rant."—By the introduction of this word *whither*, the Legislature seems to have been astute to discriminate and mark the difference between the words escape and go into, reside and be—the word *whither* applying to the two former, as the cases where a change of place had been affected; the word *where* applying to the words reside and be, where no change of situation had taken place.

Therefore, upon the whole, whether I look to this act alone, or to the four acts made in *pari materia*; whether I look to the words of this act, or the four, and construe them according to legal rules of construction, or whether I look to the great object, intent, and policy of the Legislature; in all and each of those views of the subject, I am clearly of opinion, that the man who never was in the country where the crime charged against him was committed, is as liable to arrest under this act of the 44th Geo. III. as the man who actually escapes from such country.

Two other topics yet remain, which have been urged by the Prisoner's Counsel, on which I will very briefly observe. ---It has been urged, that the mischief sought to be remedied by this act was the impunity of crimes; and that, as in this case, the Prisoner ought to be tried in Ireland for publishing this libel, this case is not within the mischief sought to be remedied by the statute, and therefore ought not to be affected by its provisions.---To this I answer, the crime of publication in Ireland is totally distinct from the crime of publishing in England: distinct in point of law; and essentially different in the consequences flowing from it.---Suppose the Prisoner convicted of publishing this libel in Ireland, could he plead *autrefers couvert* to an indictment in England for publishing the same libel? Certainly he could not. And nothing can more decisively shew that the crimes are distinct.

What

What is it that eſſentially conſtitutes the crime of a libel againſt the Government?---Its tending to alienate the affections of the ſubject from the Crown, and to bring the Government and its Officers into contempt and diſreſpect.---Can a trial in Ireland for publiſhing this libel, and a conviction here, compenſate the juſtice of England for the violation of its laws by a publication there? Or can ſuch conviction here compenſate the injury the State has received in England, by the crimes and opprobrium caſt there upon the Iriſh Government.---The crimes are therefore not only diſtinct in point of law, but moſt eſſentially different in the evils and conſequences reſulting from them; and therefore ſuch diſtinct crimes require and call for diſtinct puniſhments.

But, laſt of all, it has been urged by the Priſoner's Counſel, that the Priſoner cannot be tried in England on the indictment, and ſhould, therefore, be now diſcharged, in as much, ſay they, as he is not amenable to the laws of England, for an act done there by his influence and procurement, while he reſided in Ireland.—This poſition is too abſurd to be combated: it would ſet at nought the principles and ties which bind the two countries together, and would hold out the greateſt encouragement to crimes by the impunity it would afford.—No authority has been quoted in ſupport of it; and, I conceive, I would ill diſcharge the duties of my office, if I yielded to the confident aſſertion of ſuch a principle—a principle, which, if acted on, would go little ſhort of ſeparating the two countries.—I will only ſay this: that every ſubject of the empire is bound, by his allegiance to the Crown, to obey the laws of the empire; he is bound not to infringe the laws of any part of it, either by actually committing an illegal act, or procuring it to be done in any part of the empire. If he does ſo, he acts at his peril, and he muſt anſwer for it.

I have now gone through all the topics and arguments offered by the Priſoner's Counſel; and I have the conſolation to reflect, that the opinion I have formed in this caſe, is ſupported by deciſion of the Court of King's Bench. And here I cannot help obſerving, that this deciſion of the Court of King's Bench has been treated with too little attention

attention by ſome of the Counſel for the Priſoner.—One of the Priſoner's Counſel has told us, that the conſtruction given to this act by the Crown, (and which is now ſanctioned by the deciſion of the King's Bench) was ſo ridiculous that he would be content to be driven as a proſcribed driveller from theſe Courts, if he did not manifeſt its abſurdity to the meaneſt capacity.—It is unneceſſary for me to ſay, that, in my opinion, he has totally failed in his undertaking. But, after ſuch an obſervation, I think myſelf bound to ſtate, that, if I had entertained doubts on this ſubject, I would have conſidered myſelf bound by the deciſion of that Court—a deciſion, made after mature deliberation, and by Judges of as great legal knowledge, and ſplendid talents, as any this country can boaſt of.

On the whole, I am of opinion, that Mr. Juſtice JOHNSON muſt be remanded; and, I feel happy, that, in pronouncing this opinion, I enforce no hardſhip upon him. I only thereby afford him that opportunity, which, were I placed in his ſituation, I would moſt anxiouſly deſire—an opportunity of promptly meeting the charge, and proving my innocence.

Mr.

Mr. Baron SMITH.

In this caſe, the arreſt appearing to me to have been illegal, I am conſequently of opinion that the Priſoner ſhould be diſcharged.

Indeed, I conceive that ſuch ſhould be our rule, in a matter of leſs eaſy ſolution than the preſent. For it is only in caſes of certainty, that the Court is to remand. In thoſe of doubt, it is bound to bail, or to diſcharge. And here, accordingly, we ought to liberate, in as much as we cannot bail.

In entertaining the ſentiments which I have briefly thus avowed, I am aware that I encounter the authority of my Lord Chief Juſtice;* whoſe fallibility I am the more reluctant to admit, becauſe he would himſelf be the firſt to make, and nobly act, on the admiſſion. But, fallible he is: for he is human:—and it is ſuperfluous to ſtate, that in diſſenting from the opinion, I venerate the man.—He indeed is one, my deference for whoſe ſuperior intellect and knowledge gives way only to my reſpect for his more valuable qualities; and to the honeſt exultation which I feel, that merit ſo uncommon is placed at the head of our Crown law.—I muſt differ with ſome degree of qualm from him, who more elevated by worth and talent, than by age or ſtation, would bend a patient and docile ear to the arguments of the humbleſt man. Who, if theſe ſhould bring conviction to his candid and modeſt mind, would unaffectedly rejoice to have his errors thus corrected; without adverting to the lowlineſs of the inſtrument which removed them;—and whom this liberal ſentiment alone would have ſufficed to exalt, above the corrector to whom he yielded. A man, who may be proud; but is a ſtranger to that baſe pride, whoſe pert and diſguſting offspring are Obſtinacy and Preſumption.

I am aware that I alſo differ in opinion from one with whom I have generally had the good fortune to agree; and from whom no man, who is as well acquainted with him as I am, can diſſent, without conſiderable ſcruple and heſitation. I mean my highly eſteemed and reſpected friend, *Judge Daly*.

But

* Downes

But let it be recollected, that the peculiar ſituation of *Judge Oſborne* precluded him from giving, and perhaps prevented him from forming, any judgment on the preſent queſtion. It is poſſible that, had he not yielded to the circumſtances of a ſituation, which he conſidered ſo delicate as to enjoin ſilence as a duty, he might have delivered an opinion, in concurrence with that of the ſecond Judge of the Court, and in oppoſition to what a perſon, unacquainted with the manly integrity of his character, might ſuppoſe to be the more probable bias of his mind. In that event, the Court being equally divided, the Priſoner would have been remanded, not ſo much by a ſubſtantial deciſion on his claim, as by virtue of an etiquette and form of law.

There is then a poſſible caſe, in which the Court of King's Bench may be conſidered as having been divided. But, whether ſuch an hypotheſis be admitted or not, be it remembered, that my ſentiments coincide with thoſe of *Mr. Juſtice Day*; as independent a gentleman, and as intelligent and upright a magiſtrate, as, I believe, is to be found upon the bench of either country; and one eminently verſed and informed in Criminal law; a Judge, to whoſe hands an innocent man might commit his life; and whoſe late deciſion ſeems calculated to prove, that the liberties of the ſubject may be entruſted to his care.*

Nor am I unapprized that, in my own Court, I am likely to be left alone; another argument (it muſt be confeſſed) to ſhow that I am wrong. But here too, I have to do with men, whoſe talents will forbid them to be arrogant or uncandid: for of Talent, I find Modeſty the almoſt inſeparable companion.

Thus have I every advantage, which the impartiality of the judicial ſtation permits me to deſire.

If I could but avail myſelf of theſe.—If the Truth and Juſtice of my opinions could ſupply the deficiency of my powers, I ſhould not deſpair of making an impreſſion on my Lord and Brethren, in behalf (as I conceive) of our liberties and conſtitution.

The Priſoner's detention muſt be juſtified, if it admit of juſtification, by the proviſions of the Act of the 44th of the preſent

* See Appendix No. XIII.

preſent King, chap. 92; ſo that the queſtion is upon the conſtruction of that ſtatute.

Where the enacting clauſes are perfectly free from ambiguity or doubt, it is neither neceſſary, nor perhaps allowable, to reſort to the title, preamble, or other parts of the ſtatute, for the purpoſe of controlling the efficacy of ſuch plain enactments.

But where the enacting paſſages are *not* completely clear; but on the contrary leave room for doubt, as to what ſhould be their conſtruction, the rule is otherwiſe. For though we may not travel out of the enactments, for the purpoſe of rendering clear expreſſions doubtful; we may look beyond them, in order to make dark expreſſions clear. In the latter caſe, Law, as well as Reaſon, permit us to derive aſſiſtance from other parts of the ſame Act; and even expatiating farther for explanation, to illuſtrate the queſtion by the purview of other ſtatutes in pari materia;—by the eſſential ſpirit of our law; and fundamental principles of our conſtitution.

And here, by the way, let me proteſt againſt any argument, drawn from our ſuppoſed knowledge that the preſent Act was framed for the caſe of the preſent priſoner. My reſpect for Parliament will not allow me to admit ſuch an hypotheſis for a ſingle moment: and though I were irreverently to admit a ſuppoſition, which, on the contrary, I reject:—and though I were to know, what on the contrary, I cannot believe;—that what profeſſed to be a general and public law, was in fact a private and particular Act of quaſi attainder, I ſtill ſhould expound it by the ordinary rules of conſtruction; though I were thereby to leave the meſhes of the net too wide, for entangling the prey which it was intended to ſecure.

But, turning at once from a ſuppoſition, in the preſent caſe ſo unjuſtifiable, and in any caſe ſo inadmiſſible and culpably diſreſpectful, I will, agreeably to the doctrines which I have been laying down, admit the preliminary queſtion here to be, whether the enacting words in the fourth ſection of the ſtatute now before us, convey a meaning ſo unequivocal and preciſe, as to preclude the neceſſity or right of reſorting

elſewhere, for aid towards a ſound and correct interpretation.

The priſoner here ſtands charged with a *miſdemeanor*: and ſo far from having *eſcaped* from Great Britain into Ireland, ſince the alledged commiſſion of the offence, the paſſing of the Act, the iſſuing of the warrant, or day mentioned in the preamble,* it appears by an affidavit, which does not contradict the record before us, that from a period antecedent to the earlieſt of theſe dates, he has uninterruptedly continued a reſident of Ireland. Therefore it may for argument be aſſumed, that from the hour of his birth to the preſent time, he never has quitted this country for a moment.

Do the words then of the fourth ſection of this ſtatute preciſely apply to, and unequivocally include, ſuch a caſe as I have ſtated? and warrant the Priſoner's apprehenſion and detention?—If they do, he muſt be remanded; and conducted, with all the inſignia of felony, to England. We have no right to diſcuſs the policy of an unambiguous ſtatute; our buſineſs being not to legiſlate, but to conſtrue. What the Legiſlature has done clearly, we are to intend that it has done rightly;—nor can we conſider a proceeding, which Parliament has ſanctioned, as inconſiſtent with the principles of a free government; or as an invaſion of the Conſtitution.

But I am far from conſidering the enacting words of the clauſe in queſtion, as applying clearly to the Priſoner's caſe.

The words are, that "from and after the 1ſt day of "Auguſt, 1804, if any perſon, againſt whom a warrant "ſhall be iſſued by a magiſtrate of Great Britain, for any "crime or offence, againſt the laws of England or Scotland, "ſhall *eſcape*, *go into*, *reſide*, or *be* in Ireland, it ſhall be "lawful to"—proceed, as has been done in the caſe before us.

It is plain, that Mr. Juſtice JOHNSON does not come within the deſcription of perſons who have eſcaped, or gone into Ireland. The affidavit, already adverted to, excludes him from that claſs; and, if the enacting words had ended

* Viz. the 1ſt of Auguſt, 1804.

ended here, would manifeſtly exempt him from the operation of this ſtatute.

But the enactments do not ſtop here. They extend to certain caſes of perſons who *ſhall reſide* or *be* in Ireland. Therefore, if theſe words indiſputably embrace Judge JOHNSON's caſe, there is no more to be ſaid. We may cloſe the ſtatute, without examining the remaining clauſes; and with becoming reliance on the wiſdom, and deference to the beheſts of Parliament,—muſt remand the Priſoner, without trembling for the Conſtitution.

But theſe ſupplemental words, ſo far from relating unequivocally to the caſe before us, according to my conſtruction of them, do not apply to it at all.

At leaſt, it cannot be alleged, that they admit of but *one* reaſonable expoſition; or, conſequently, that they are wholly unambiguous:—and if their ambiguity be once conceded, ſuch admiſſion will let in, for the purpoſe of explanation, the remaining paſſages, and general context of the ſtatute; the policy of the law, according to one or other of the propoſed conſtructions; together with the aid of thoſe various topics which I have already noticed.

It cannot, I ſay, be contended, that the words "ſhall "reſide or be" can *only* mean ſhall from his birth *have* conſtantly reſided, or from the hour of his nativity ſhall uninterruptedly *have* been. It muſt, on the contrary, be allowed, that ſuch words *may* denote a reſidence, which, though not of future commencement, (with reference to the iſſue of the warrant,) yet originated in that previous removal or eſcape, which, as well from the title and general ſcope of the Act, as from the immediately preceding and contiguous words in this very ſentence, appears to have been the cardinal fact, in contemplation of the Legiſlature.

Indeed the firſt of theſe interpretations I am ſo far from holding to be the *only* rational one, which the expreſſions can receive,—that ſo to interpret them, would, as it ſeems to me, be (at ſome expence of grammatical correctneſs) to violate the liberty of a ſubject,—to contravane the ſpirit of the Habeas Corpus act,—and to ſap ſome of the beſt principles of our truly valuable Conſtitution.

I therefore ſhould, with little heſitation, conſtrue theſe words, if they alone were placed before me, as if the ſentence ran, "ſhall eſcape, go into, or" (having done ſo) ſhall "reſide or be."—In other words, I ſhould hold the Legiſlature to have deſcribed a tarrying or reſidence, following upon, and having commenced with a removal.

But it is enough for me if, without too great ſubtilty of refinement, the words will admit of more than one interpretation. For then we may inſpect the whole of this* and other ſtatutes;—revolving, at the ſame time, the maxims of our Law, and Conſtitution,—in order to decide which of theſe poſſible expoſitions is the right one. Thus it is, that the policy of the law comes under our conſideration: a due reſpect for Parliament inducing us to conclude, that a conſtruction, which renders their Act impolitic, muſt be a falſe one.

Having entitled myſelf to this latitude, I ſhould yet begin the inveſtigation by reſorting *not* to any other ſection of the ſtatute, nor even to the recitals or introductory parts of this;—but, confining myſelf to the context of the *enacting paſſages themſelves*, I would obſerve, that if the expoſition which I diſſent from be adopted, the words "*eſcape*," "*go into*," and "*reſide*," will be impliedly rejected as ſuperfluous and uſeleſs; inaſmuch as in this view, the ſingle ſweeping expreſſion, the deſcriptio generaliſſima, "*ſhall* BE"—would comprehend every caſe, to which the other words could by poſſibility extend. Invert the order; and the ſuperfluity becomes more apparent—"If any perſon "ſhall be in, reſide in, eſcape or go into" This would be as if a ſtatute were to ſay—if any quadruped, or horſe, or dog, or cat, &c.

On the contrary, the conſtruction for which I contend, beſides being perhaps more conſonant to the rules of grammar, and certainly far more favourable to the ſubject's liberty, is alſo more conformable to an eſtabliſhed rule of interpretation: becauſe, inſtead of expunging any words which the Legiſlature has introduced, it gives (by the removal of tautology) ſome degree of meaning and efficacy to them all.

For,

* Agreeable to the maxim of Sir Edward Coke, that a ſtatute ſhould be expounded, toti lege inſpecta

For, 1ſt, a perſon may, after warrant, *eſcape* into Ireland:

Or, 2dly, without *eſcaping*, (according to the technical meaning, or even ordinary acceptation of that word,) he yet, after a warrant ſhall have been iſſued, may go thither, on (perhaps) his ordinary occupations;

Or, 3dly, having, *before* the iſſue of the warrant, abſconded, or without abſconding, arrived there,—he may, at the time of its iſſuing, be reſident in Ireland:

Or, 4thly, he may *be* there, not as a fixed reſident, but merely as a tranſient and temporary ſojourner.

For theſe ſeveral caſes, the Legiſlature, according to my conſtruction of their ſtatute, will, without plainly tautologous repetitions, have provided; and prevented any quibbling evaſions of the Law, by a perſon who might otherwiſe be beyond the letter, whilſt his caſe was within the ſpirit of it.

Again, the authority, which this ſection of the ſtatute gives, is reſtricted to offences committed againſt the laws of England, or of Scotland; (recognizing, by the way, their diſtinctneſs from thoſe of Ireland.)

Now though there may be caſes, where a perſon, himſelf in one place, can yet commit a crime within another, ſtill theſe are but rare exceptions to the general truth of the poſition, that whoſoever is guilty of a crime, muſt himſelf, at the time of its perpetration, be in the place where it is committed.

This general truth is much more likely, than exceptions of rare occurrence, to have been within the contemplation of the Legiſlature;—who may be therefore intended to have directed the proviſions of their Act to the purpoſe of making perſons amenable, who having *been in* England or Scotland, and there broken the law, ſhould afterwards quit the ſcene of their tranſgreſſions; and get beyond the ſphere of the juriſdictions which they had defied.

Thus, *firſt*, whether after warrant iſſued, they ſhould *abſcond*, or only *migrate*: or *ſecondly*, previouſly to its iſſuing, had *already* eſcaped, or gone into Ireland; or, *thirdly*, whether they were temporary ſojourners, or permanent reſi-

dents,

dents, in that country,—all these would be immaterial and nugatory enquiries. In each case, the Arm of the Law, no longer halting, would overtake them: would annull the pernicious effects of their migration; and make them responsible for the offences which they had committed.

But, still, an indispensable requisite in each case,—a preliminary *sine quâ non* would be, that they *had been in* England or Scotland, (as the case might be,) and having there transgressed the local law, had afterwards withdrawn themselves from British jurisdiction.

The words, "*against whom a warrant shall be issued*" (in this section) may not have been enough considered, or made use of, to assist us in construing the words "reside or be."

If it had merely been enacted, that "if any person, "against whom a warrant should be issued, for a crime of "which he had been guilty in Great Britain, should escape "or go into Ireland," such words might only include the case of a migration subsequent to the issue of such warrant —and criminals withdrawing themselves in the interval between the commission of the offence, and the issue of the warrant, might thus evade the Law. Therefore, the words "*reside* or *be*" are properly subjoined. These latter words include a greater portion of time; and extend the provisions of the Act to the case of a migration, subsequent indeed to the crime, but previous to the warrant.

And this construction is supported by the following facts, viz. that the statute, which we are now expounding, is taken from an Act passed for the case of England and Scotland, in the 13th of the King; and which is itself derived from, and in some degree compounded of, two English acts for county and county, passed in the 23d and 24th years of George II. The first of these latter Acts uses the words "*escape* or *go* "*into*," merely: whereas the second, without altering the scope or meaning of the former, added the more comprehensive words *reside* or *be*. Plainly, because the letter of the earlier statute had failed to reach a case within its spirit; viz. a removal from one county to another, before the issuing of the warrant, though after the commission of the crime. A collation of the preambles of the 23d and 24th of George II. *puts this matter beyond doubt*; and proves that the words "*reside, or be;*" were inserted in the latter Act, *merely* on this

this account:—and the general preamble of the 44th of the King, (which is, properly ſpeaking, diſperſed and ſcattered through the firſt, third, and fourth ſections,) is, ſubſtantially, a mere compilation from thoſe two preambles: and therefore ſhews, that the words "*reſide or be*" have been introduced, eodem intuitu, into this recent ſtatute.—I ſay, firſt, that the ſtatute now before us, contains no *general* preamble; except one, formed by a collation of the introductions of its firſt, third, and fourth ſections. For the firſt of theſe is confined to removals from one Iriſh county to another: the third, to migrations from Ireland to Great Britain; and the fourth, to eſcapes from Great Britain into Ireland: whereas the *general* purview of the Act extends to all thoſe caſes; viz. of eſcapes from county to county; and reciprocally from each of the iſlands to the other. Secondly, thus *collected*, the general preamble of the Act before us, is ſubſtantially equivalent to the joint preambles of the 23d and 24th of George II.—The only difference is, that the 24th of his late Majeſty, being an amendment of a former ſtatute, of courſe contains a ſpecial and pointed recital, of the omiſſions and inadequacies which it meant to cure;—whereas the 44th of the King, being no amendment of any former Act, includes no ſuch reference, nor any ſuch recital.

Another enactment, of the fourth ſection of the preſent ſtatute, ſeems to favour my opinion, that the caſes which Parliament had in contemplation, were thoſe of perſons who had been in Great Britain; and having there offended, removed afterwards to Ireland.

The paſſage to which I allude is that, by which the Britiſh Magiſtrate, "is authoriſed to proceed with regard "to ſuch perſon," when brought before him, "as if he "had been legally apprehended in England or Scotland."—That is to ſay, as if he had not quitted the country, of which he has violated the law.

Excepting the few digreſſive remarks which have juſt occurred, I have hitherto confined myſelf, not only to the 4th ſection of the 44th of the King, but to its mere *enacting* parts; without drawing any arguments from its preamble, or recitals.

I now, *without travelling beyond this clauſe*, would conclude my obſervations on it, by calling the attention of my hearers,

to

to the introductory ſentence;—which expreſsly ſtates, that the evil and "inconvenience," for "remedy" of which, its proviſions are enacted, is "the *eſcape* into Ire-"land of perſons guilty" (not of offences, but) "of crimes, "in England or Scotland."

But this introductory ſentence goes farther ſtill. The evil, to which it proceeds to apply a remedy, it ſtates to be the *like* inconveniency, with that recited in the preamble, and corrected by the proviſions of the *preceding* ſection.

Thus the introductory part of the third ſection becomes, by reference, incorporated with that of the fourth; and we may have, and ought to have, recourſe to the former, for the purpoſe of explaining the doubtful enactments of the latter.

What, then, are the introductory recitals of this third ſection?

1ſt. That it may happen,
2dly. That felons, and other *malefactors*,
3dly. *In* Ireland, or Great Britain,
4thly. Make their *eſcapes* reciprocally *from the one Iſland to the other*.
5thly. *Whereby* their offences often remain unpuniſhed.
6thly. By reaſon of there not being *ſufficient* proviſion by the *laws* in force in Great Britain and Ireland *reſpectively*, for apprehending and tranſmitting *ſuch* offenders, to the country *in* which their *offences were committed*.
7thly. That for *remedy thereof*, it be enacted, as then follows.

Theſe ſeveral paſſages, forming a preamble, which belongs as properly to the fourth ſection as to the third,—I ſhall now proceed to conſider ſeriatim.

Firſt, The words, "*it may happen that malefactors eſcape*," are proſpective; and, when connected with the following expreſſions, "*ſhall reſide or be*," ſuggeſt a reſidence,—enſuing upon ſuch preliminary elopement.

And, by giving a different interpretation to theſe latter words, we might be guilty of more than a merely critical tranſgreſſion.

tranſgreſſion. We might turn this Act into an *ex poſt facto* law; which ſhould not only bring a ſtale offender to juſtice, by infinite, (or at leaſt indefinite) *retroſpection*; but might, after a lapſe of many years, pervert a lawful action to a crime. As where, for inſtance, the act prohibited in England, had been, when done in Ireland, permitted, by the laws of that then diſtinct and independent realm. Thus the ſtatute would be conſtrued to do that, which thoſe who oppoſe my conſtruction, not only admit, but *inſiſt* that it has not done; it would create, not merely a new amenability, but a new offence.

Secondly, If the term *malefactor*, (not found in the firſt ſection, which extends clearly to inferior offences,) be applied to perſons charged with trivial miſdemeanors, the application will at leaſt be novel and unuſual; and can only be ſupported by obſolete reſearch.

To ſuppoſe that Parliament intended to deſcribe, under the opprobrious title of malefactors, perſons guilty of the ſlighteſt and moſt pardonable tranſgreſſions, might be to impute to them phraſeology, diſproportionate at the leaſt. Such a conſtruction would ſtigmatize as a malefactor, any man, who, under the influence of the moſt intolerable provocation, committed a merely *conſtructive* aſſault; by raiſing his hand, without ſtriking the provoker. It would aſcribe to the Legiſlature the improbable intention, that if, after having lifted his hand in England, any buſineſs or accident brought ſuch a man to Ireland, he might, after the interval of half a century at leaſt, be hurried without bail or mainprize on board ſhip, and carried back *to the place from whence he came*; and which ſuch a conſtruction would transform, from the abode of freedom, to a gaol.—The place where he had been betrayed into this imprudent geſture; and where, after a tedious impriſonment and irkſome voyage, he might probably, on conviction, be fined ſixpence, and diſcharged.

What a horrid inſtrument of envenomed and oppreſſive vengeance, in the hands of an implacable and malignant foe, might---not the ſtatute, but this perverſion of it, ſupply!---Can we believe that, by the epithet *malefactor*, Parliament deſignated ſuch a venial treſpaſſer as I have deſcribed?---Yet, unleſs we believe them to have ſo intended,

tended, the case of Judge Johnson is not within the desig-nation. For a libel is no more than a misdemeanor: and if persons charged with libelling---be *malefactors*, we must admit that the grievously outraged man, who merely elevates his hand against his reviler, is likewise a *malefactor*; and, as such, within the law.

Indeed *Libel* ranks beneath even the slight transgression which I have noticed. For a libel *not being*, but only *at the utmost tending to*, a breach of the peace, is not an offence, for which sureties of the peace could be required; if we may trust to the authority of 1st Lev. 139; and to the judgment of Lord Chief Justice Pratt, in the case of the King against Wilkes; as reported in 2d Wilson, in the State Trials, and in a Digest of the Law of Libels.

Indeed, though his Lordship there declares it to be "absurd, to require surety of the peace from a libeller,"---yet he seems to admit that there was one case, (I mean that of the seven Bishops,) in which the contrary opinion had been maintained. But as he denies that case to be law; or an authority to prove any thing, save, "the miserable "condition of the times" when it occurred,---I could not, upon the whole, desire to see doctrines, recognized in the case of the seven Bishops, used to sanction proceedings against the twelve Judges of this country.

This doctrine of Lord Camden, that sureties of the peace *cannot* be demanded of *a libeller*, becomes more material in support of my argument, and in exclusion of libellers from the class of *malefactors*, if we collate it with 2d Hale, P. C. 136; where it is laid down that *malefactors may be bound* to their good behaviour.

In Wilson, and also in the State Trials, my Lord Camden is made to express a farther opinion; viz. that it is absurd to require *bail* of a libeller. But not being able to reconcile this latter expression with either principle or practice, or with other dicta, which occur in the same case, I presume that the reporter must have made some mistake.

Therefore, declining to avail myself of a doctrine, which I cannot understand, I confine myself to repeating, that a libel is no more than a misdemeanor; and that all such offences

offences are bailable at the leaſt. (Com. Dig. tit. Bail, F. f. 3. page 661.)

And though the moral turpitude of ſome libellers may greatly exceed that of the conſtructive aſſailant whom we have noticed, yet there might be libels, which, in foro Conſcientiæ, (the tribunal where all diſcretionary puniſhment is defined,) would be little, if at all, more culpable than his aſſault.

Libels include many and various ſhades of guilt; from atrocity of the deepeſt gloom, to a twilight verging the pure horizon of Innocence itſelf.

There are libels, which are falſe and poiſonous. There may be others, which are true: and which might be harmleſs,—if it were not for the proud and angry paſſions that they rouze. Enraged to find their faults, or abſurdities expoſed, vanity may tempt thoſe who are ſo detected to break the peace; and thus the malice of the libelled ſerve, in ſome degree, to conſtitute the guilt of him that libels; the tendency of ſuch publications to create animoſity being, according to Sir William Blackſtone, (4th Com. 151.) the whole of what, in a criminal proſecution, the Law (until conviction) can conſider.

The caſe of unwritten defamation is widely different. There, the words muſt impute a crime; and muſt impute it falſely. In ſuch caſes, therefore, there is a *malum in ſe* on the part of the (yet not proſecutable) offender; and towards conſtituting *this* ſlanderer's guilt, we need not have recourſe to the ſpite of his opponent.

That I do not miſrepreſent the law, by ſuppoſing the caſe of a *true* libel, cannot be denied. For, from the eſtabliſhed maxim, that on an indictment the truth of the libel will be no defence, we muſt infer that ſuch anomalies, as true libels, may exiſt.

But, feeling that what *technically* amounts to libel, may ethically be a ſlight and trivial fault,—not only the Judges of the King's Bench, the Cuſtodes Morum of the country, will generally refuſe an information, unleſs it be pointedly and diſtinctly ſworn, that the written charge is untrue; (Doug. 284.) but after conviction, on an indictment, the Court may take the truth of the writing, and other circum-

ſtances into conſideration; and inflict a mitigated puniſhment in a venial caſe. Inſomuch, that after his voyage and confinement, the Libeller, like the Aſſaulter, might have to pay no more than ſixpence in the ſhape of fine.—In ſuch an event, how ſtinted would the vengeance of a reſentful proſecutor be, who was not permitted to carry his victim, without bail or mainprize, beyond ſea!

Again, another ſpecies of libel might be remedial; if it were not that no tranſgreſſion of the Law can be ſo held; and that the vanity and ſelfiſh paſſions of thoſe, whoſe conduct they regarded, might cauſe ſuch writings to irritate, where they would otherwiſe correct.

So far from being likely to find a modern Ariſtides, who, at the deſire of an obſcure and illiterate fellow citizen, would himſelf write the unjuſt ſuffrage which ſhould exile him from power, we might ſometimes, amongſt future Stateſmen, meet with thoſe, who would ſeek to cruſh with the heavieſt vengeance of the Law, ſuch as truly exhibited their errors to a ſuffering public; and would try to aſcend by ſteps, not of legiſlative frame, but of their own unconſtitutional conſtruction, to the very pinnacles and loftieſt apices of our code; in order to pounce with the greater force, upon their quarry, from a diſtance.

Therefore, no libel can be regarded as being uſeful in fact,—any more than it is permiſſible by law. But the ſhades of criminality, as we have ſeen, are very various:—and, as by our preſent deciſion we eſtabliſh a general rule,—it ſhould be aſſumed, that the caſe before us is one as venial, as might, by *poſſibility*, occur.

Let me not be underſtood to ſay, that the preſent is a caſe of ſlight tranſgreſſion. It might, on the contrary, turn out to be one of deep enormity. It will be for a Jury, if the matter ſhall come legally before them, to pronounce whether the Priſoner be innocent or guilty; and if the latter, it will be for the Judge, in meaſuring the puniſhment, to define the atrocity or ſlightneſs of his offence. Meantime, I aſſume the caſe to be a venial one; merely becauſe ſuch a caſe might occur; and to ſuch a caſe our preſent deciſion would apply.

If

If I ſought to give examples of leſs pardonable defamation, I might inſtance a groſs libel on his Majeſty, and on our eſtabliſhments in Church and State; ſaid to have been publiſhed, I will not ſpecify when or where; ſo that to no publication can my deſcription be applied, which does not come glaringly within it, by being a ſeditious libel. I might notice a moſt calumnious and groundleſs rumour, which ſome malicious ſlanderers ſent forth,—that perſons connected with the Government, forgetful of ſuch connexion, gave this libel encouragement, and circulation. I might advert to a ſcandalous report which went abroad, that a perſon, pointing at one of the Judges as he adminiſtered juſtice from the bench, was heard to ſay, "that "ſcoundrel will not long ſit where he is: ſufficient evi- "dence is procured againſt him." I might remind my hearers of ſome printed ſcandal, directed againſt the magiſtrates of a reſpectable county; and involving in its obloquy, the general loyalty of Ireland;—or I might allude to a piece of ſlanderous deriſion, contemptuouſly inſcribed to Mr. Juſtice Fox; and falſely attributed to a gentleman of the Bar. I might throw in the example of the like pus atque venenum, levelled againſt me; and ſubſcribed with a real or fictitious author's name. In this invective, (erroneouſly, perhaps, aſcribed to a penſioner of Government,) I am (in order to promote a due reſpect for the adminiſtration of Juſtice,) repreſented to the public, in my judicial character, as vain, empty, capricious, ignorant, ill-tempered, malignant, ſervile and corrupt. I might hint at a falſe rumour, which ſome have contrived to ſpread,—that the Preſs of this country, whoſe freedom, on the contrary, ſo ſtrongly ſupports our Conſtitution, has been ſuffocated by the combined efforts of Menace and Corruption. Or, laſtly, I might recal an equally falſe report, that one Judge was publicly declared to have compoſed thoſe writings, for which another Judge is now ſaid to be indicted. Such a declaration is by Rumour alleged to have proceeded from one, whom no man that knows him, can reſpect more than I do: whoſe public virtue I will admit to be equal to his private worth; and who, if he were a monarch, might, I doubt not, prove a father to his country.

If it were certain that the above caſes had occurred, I perhaps might cite them as inſtances of heinous defamation.

mation. But I cannot well ſuppoſe them to have all happened:—and even if they had, I ſhould feel more pleaſure in commending (though to ſome portion of this praiſe I might myſelf perhaps lay claim,) the lenity, which has forborne to take proceedings againſt ſuch offenders.

If I have been endeavouring to dilute the criminality of libel, and reduce it to its proper, and its legal ſtandard, I might refer it to ſome perhaps of thoſe who hear me, whether it would be eaſy to pitch upon a man, who has fewer motives for being partial to calumny, than I have.

I therefore proceed with the leſs ſcruple, to obſerve that it is no anſwer, to what I ſome time ago objected, to aſſert that libel being *maleficium*, he who is guilty of it is *malefactor*. The argument would prove too much; and therefore it proves nothing, "*Crime* and *miſdemeanor*," (ſays Judge Blackſtone) "are, properly ſpeaking, ſynonimous terms."—Yet who would pronounce that a ſtatute, purporting to relate to *crimes*, muſt *therefore* be extended to miſdemeanors? When the ſame learned commentator informs us farther, that, by the *Norma loquendi*, common uſage, the word *crime* denotes offences of a deeper dye; while ſmaller faults are compriſed under the gentler title of *miſdemeanor*.

Indeed, if *maleficium* were the radix, from which theſe ſtatutable *malefactors* ſprung, then every perſon guilty of a *tort*, every wrong-doer might be a malefactor, within the meaning of this Act. For, every civil action, which is not founded on a contract, ariſes (and is held to do ſo) ex maleficio, or delicto; and the general iſſue which a Jury, in theſe latter caſes, has to try, is whether the defendant *be guilty* or *not*?---Thus a man charged with ſuch a *converſion* as might merely entitle the plaintiff to recover againſt him in trover, being accuſed of maleficium, would be a *malefactor*, by the ſtatute in that caſe made and provided; and as ſoon as the declaration, (i. e. charge) was on the file, might, if the venue were laid in England, be hurried over, without bail or mainprize, to that country.

Or again, (and note the dilemma,) reſtrict the operation of the Act to public wrongs; and mark what follows from the conſtruction which I oppoſe. He who ſpeaks the foulest,

foulest, falsest, and most injurious scandal, is not an object of legislative rigour: whilst he who writes and publishes what is strictly true, and eminently venial, and only provoking, because the person written against is vain,—shall be caught within the talons of this (so construed) penal law.

The above allusion to *delictum*, and forced construction, which it is sought to put on the word *malefactor*, reminds one of what is recorded by Lord Clarendon and Mr. Hume, to have taken place in the disturbed reign of the unfortunate Charles I.

The ruling Powers (say these historians) then invented "the term *Delinquents*; to express a degree and species "of guilt, not exactly known, or ascertained. In conse- "quence of which invention, many of the nobility and "prime gentry found themselves involved in the crime of "*delinquency*. Whoever incurred the displeasure, or sus- "picion of Administration, was committed to prison, and "prosecuted, under the notion of delinquency. After all "the old jails were full, many new ones were erected; "and even the ships were crowded with the gentry; who "languished below decks; and perished in those unhealthy "confinements: while the Government in the mean time "established the maxims of rigid law; and spread the "terror of its own authority."

From the second passage in the preamble to the third clause, (which by adoption is become the preamble to the fourth,) I therefore am inclined to pronounce, that the offence charged upon Judge JOHNSON, not being one of the *majora crimina*, he is not, by common usage, or in technical language, a *malefactor:* that, consequently, his alledged transgression was not in the contemplation of Parliament; and that on this ground he is exempt from the operation of the present Act.

It is true that this argument might operate to protect a person, who having committed a gross and aggravated misdemeanor in Great Britain, had removed into this country, to elude the law:—and thus a mischief would arise, and an intention be frustrated, which it might not be unreasonable to attribute *conjecturally*, to the Legislature. Then let our lawgivers (if to their wisdom one seems wanted,) frame

frame a ſtatute, which, without departing from the legitimate rules of conſtruction, we may interpret to embrace ſuch miſdemeanors, if attended with eſcape.

But let us not meantime found conjectures as to the intentions of our Parliament, on matter *dehors* the Act which we are reading, and ſtill more *dehors* the maxims of the free Government under which we live.

Let not thoſe who but now, impriſoning themſelves within the enactments, refuſed to ſearch for the lawgiver's intention in even the neighbouring preamble, inconſiſtently entrench on the extenſive ground of vague ſurmiſe, to make a breach in that conſtitutional mound of freedom, the Habeas Corpus act; by rejecting bail from one charged with a merely bailable offence,—on the ſpot where the capture has been made; and where Law and Juſtice concur in directing that bail ſhould be received. Let us not make a practical and pernicious *bull*, in endeavouring to ſecure a part, by a ſacrifice of the whole: in removing the foundation, to complete or decorate the building. Let us not commit a more heinous offence than libel, by ſo ſtraining an Act of Parliament, as to riſk ſubverting the conſtitution. Let us on the contrary recollect, that one of the moſt fundamental principles of law is this, that no man, apprehended for a miſdemeanor, who can find ſecurity for anſwering a charge, of which the law preſumes him innocent,—ſhall be deprived of his liberty for a ſingle moment; or removed even an inch from the ſpot where he was taken:—much leſs *exulet,—vel utlagetur, vel aliquo modo deſtruetur:* much leſs ſhall he be ſent an impriſoned exile from his country;—an outlaw, beyond the ſphere of his native code;—to be ruined in his health, his character, and fortune;—and this perhaps for the loweſt of all offences: the ſtatement of a truth, by which ſome vindictive man, inſtead of being corrected, is annoyed.

No: as yet the Bench of Ireland is independent. If it ceaſed to be ſo, I ſhould ceaſe to ſit upon it: and while it does (and may it long!) continue free, I will never convert myſelf into a legiſlator by conſtruction;—for the purpoſe of repealing the Habeas Corpus law, or abrogating Magna Charta. That the Legiſlature will annul either, I am far from fearing or predicting. But if ever it ſhould be their intention

intention ſo to do,—the words reſorted to for the purpoſe, in order to their being efficacious, *muſt be expreſs.*

Thirdly: the malefactors, ſpoken of in this preamble, are deſcribed as being *in* Ireland or Great Britain: that is to ſay, (whilſt we are conſidering the fourth clauſe,) as *in* Great Britain.

Thus this paſſage is conſiſtent with the reſt; and favours my idea, that to give operation to the ſtatute, the offender whom it is ſought to arreſt in Ireland, ſhould have been *in* Great Britain when the offence was committed.

Fourthly: the laſt mentioned ſentence, if it wanted explanation, is explained by the ſtatement which next follows; viz. that ſuch malefactors may *make their eſcape* from one iſland to the other:—to remedy the miſchief ariſing from which *eſcape*, is the object which the Legiſlature profeſſes to have in view.

Now how a perſon, already in Ireland, and there quieſcent, could contrive at the ſame time to be eloping from England thither, I confeſs myſelf at a loſs to comprehend.

Indeed this appears to me to be one of thoſe impoſſibilities, which are equivalent to a change of ſexes; and which therefore, on the authority of Lord Coke, we may doubt the competence of Parliament to enact.

Therefore, Judge JOHNSON having been in Ireland, from the year 1802, to the preſent time, muſt have found it impracticable to eſcape thither in 1804; and conſequently cannot be within the meaning of the act, ſo far as this preamble guides us to its true conſtruction. His caſe not being within the evil, is not within the remedy.

On a matter not before me, I am not bound to give an opinion. But it might perhaps, with more than plauſibility, be doubted, whether in the caſe of *higher* miſdemeanors, attended with eſcape, there would be unreaſonable rigour in refuſing bail from the offender, until he was reconveyed within the pale of thoſe juriſdictions from which, after outraging them, he had retired. The elopement might at once be evidence and an aggravation of his guilt, ſufficient to render him, properly ſpeaking, a malefactor; and juſtly to deprive him of part of the privilege of bail. Beſides, his

eſcape was a wrongful act: of which we perhaps ſhould be allowing him to take advantage, if we admitted him to bail, before he were brought back. But to make this reaſoning apply, there muſt be *an eſcape*;—and the rule ſhould be confined to miſdemeanors of a ſerious nature. In a word, it will be for the Legiſlature to make ſuch a rule, if ſuch be wanting. I merely doubt whether it can be collected from a ſound conſtruction of the Act before us.

Fifthly: (to return;) the preamble goes on to ſtate, that the only way in which theſe eſcapes are miſchievous, is this; viz. that *thereby*, the offences remain unpuniſhed. Now thoſe who apply the enacting words which follow, to the ſituation of the preſent Priſoner, lay the baſis of thoſe enactments in a falſe recital. For the recital would be untrue, if it were interpreted to ſtate, that in the caſe before us, any ſuch miſchief or *impunity* need ariſe.

The miſdemeanor, charged to have been committed by this malefactor *in England*, is a libel: and for any thing we can know to the contrary, a venial libel; containing nothing but the truth. The definition of libel, as we have already ſeen, muſt be comprehenſive; in order to be commenſurate with the ſpite and inſolence of Man.

The neceſſity for drawing a line thus conſtrains us to admit a doctrine, which might (I grant) be puſhed to inconvenient lengths. The proſe writer, who by depicting their deformity, endeavoured to ſcare or baniſh Slavery, or Vice, might be puniſhed as a libeller, when he hoped to be honoured as a reformer,—for having unwittingly ſketched a likeneſs of ſome tyrant or malefactor, as ſtriking and as caſual, as that which we have ſeen of *Chaucer*, traced by the ſportive hand of nature, on a pebble:*—whilſt the poet, who deſerting the ſafe labyrinth of "no meaning," ſhould raſhly venture to "tell either truth, or lies," might repent him, as bitterly as *Horace*, of his Iambicks: or if he ſtrayed into a perhaps not "needleſs alexandrine"—but one which on the contrary, the ſubject much required, might find that, agreeably to the critic's prediction, he had to do with "a wounded ſnake."

Let me again proteſt againſt being ſuppoſed to aſſert the truth of the publication, which has produced the queſtion

now

* In the Britiſh Muſeum

now before us. It would indeed be the reverſe of true, if it denied the worth or honour of the juſtly reſpected, and truly excellent Lord Hardwicke: if it diſparaged the knowledge, or impeached the integrity of Lord Redeſdale; or repreſented my eſteemed friend, and upright brother, Mr. Juſtice Oſborne, as a man of corrupt principles, or meanly pliant diſpoſitions.

But its contents are not judicially before us; nor if they were, could our deciſion properly turn on their enormity. Reſting upon wider grounds, our determination would extend as an authority, to the moſt venial caſe, coloured with the ſlighteſt and the fainteſt tint of blame. Such a caſe we ought therefore to take the preſent one to be.

Now it appears that the maleſactor was *in Ireland*, at the time when the libel is alleged to have been written. Conſequently, if guilty, he muſt be ſo by having tranſmitted it to England.

If he did ſo by dictating the contents to another, this was a publication, for which he may be puniſhed here.

Or if a libel were contained in a letter, written in any Iriſh county, and there delivered to a meſſenger, or put into the Poſt-office, he may be proſecuted, where he thus departed with the poſſeſſion of it. That is to ſay, he is liable to be proceeded againſt, in Ireland. He muſt be ſo, as long as the caſe of *Metcalfe againſt Markham*, in 3d Term Reports, is law.

For where the one tranſaction is at once a private injury, and public wrong, the ſame circumſtances which would ſuffice to change the venue into a given county, on the allegation that the cauſe of action had ariſen there, muſt alſo furniſh ground of indictment within that county.

Thus, though Judge JOHNSON ſhould be guilty, his offence need not remain unpuniſhed; and therefore his caſe does not come within the miſchief, which this ſtatute was emphatically meant to remedy.

While I am upon this ſubject, let me add, that if a caſe were conceivable, (which by me it is not,) where a libeller, without quitting Ireland, could be guilty of publication

exclusively in England,—and consequently where, not being amenable to British power, he would, unless by virtue of this Act, escape punishment *altogether*—still the present Act should not be applied to such a case. For we could not draw the line; but must likewise extend the statute to other cases, not within the mischief, against which the Legislature was providing.

If this Act be defective, it only follows that it should be amended. Meantime our business is not to add new clauses; but to expound those which are set before us. Besides it is clearly better that one case should escape the statute, than that by straining to catch this, we should grasp others, which Parliament never intended to include.

Resorting to considerations of policy, as guides to sound construction, I would observe, that such an extension might produce the most unconstitutional effects.

It might enable a Government in Ireland, (I advert to future, and merely possible, not actual circumstances or times,) which found its conduct strongly animadverted on, and chose to consider the animadversion as nothing the less libellous, for being true,—to withdraw the trial of the question from an Irish tribunal, and take it from a jury of the vicinage, to the inhabitants of (juridically) a foreign country:—to persons less cognizant of the situation,—less anxious for the liberties,—less interested in the welfare of Ireland than we must be,—and who would be less exposed to the oppressions of its Government, if these existed:—to persons of whom some, (as there seems too much reason to apprehend,) know about as much of the situation and interests of this country, as they do of the interior of Africa, or of the kingdom of Ava.

It might enable them to remove the case to a tribunal, less competent than our own, to pronounce upon that truth, which may be urged to extenuate, though not to justify the offence.

It might enable them to make choice of a tribunal, judging of the state of this country, and the conduct of its Government, from the reports made by those very ministers, who thus changed the *venue*, from the place where (if any where) the crime was *actually* committed, to where it was only

only perpetrated by *conſtruction:* miniſters, who might detain their opponent without bail or mainprize,—hurry the moſt dignified of our magiſtrates on board ſhip, and convey them, in the guiſe of felons, to another country,—there to regain their liberty, when they could prevail on ſtrangers to be their bail,—there to abide their trial, without the power of enforcing the attendance of witneſſes, to prove their caſe.

When the Legiſlature ſhall plainly enact that this may be done, then, but not ſooner, let us recognize a law, which to common eyes, and perhaps but ſuperficial obſervation, appears ſo little favourable to the liberties either of the ſubject, or of the preſs.

The time might come, when ſuch abuſes, as I have been noticing, would prevail.

I ſhall here take the liberty of digreſſing to a collateral ſubject; nearly connected however with the principal inquiry; and ſtill more cloſely allied to what I hold it my duty to aſſert: I mean the reſpectability and honour of the judicial ſtation

I allude to a letter, (which while I was an aſſeſſor of my Lord Chief Juſtice, I heard read;) written by Sir Evan Nepean, and addreſſed to Mr. Juſtice JOHNSON; in which the former very properly ſuggeſts, that it would become the punctilious dignity of a Judge to promote, rather than obſtruct, the inveſtigation of his conduct; and of the truth of any criminal charge preferred againſt him.

Whether Mr. Juſtice JOHNSON be innocent or guilty, is a queſtion neither within my power, nor my province, to decide. It is *quæſtio facti; ad quam Judices non reſpondent.*

But I owe it to the character of that exalted (and I hope reſpected) order, to which I have the honour, (for it is ſtill an honour) to belong,—to obſerve that he does not ſeem to me to have ſhrunk from trial; or betrayed unwillingneſs to be amenable to juſtice.

He has but manifeſted a reluctance, compatible with utter innocence; and which, in ſimilar circumſtances, I ſhould feel: a reluctance to be tried before a diſtant, and comparatively incompetent tribunal; without means of ſecuring the teſtimony of witneſſes in his own behalf.

Beſides,

Beſides, I may ſuppoſe him to have entertained the opinion, which I avow myſelf to hold;—viz. that any arreſt of him, under this ſtatute, is illegal. If ſuch were his opinion, he would have owed it more to the laws and liberties of Ireland, than to himſelf,—to diſpute the validity of an unconſtitutional apprehenſion:—and he would, at a moment critical to the Bench, and to the Country, have been a traitor to the privileges and independence of his order,—and to the Freedom, Laws, and Conſtitution of the Iſland which gave him birth,—if he had not acted preciſely as he has done:—by eluding, with an addreſs and preſence of mind which do him credit, what might have ſeemed, but certainly was not, an attempt to hurry him beyond ſea, with a celerity, which ſhould outſtrip the languid march of the Habeas Corpus.

I impute nothing to thoſe who executed the warrant. It commanded expedition; and perhaps they but obeyed it. But, (ſpite of the reſpectable ſupport which it has obtained,) I impute much to a conſtruction, which gives ſuch efficacy to this proceſs; whilſt it paralyſes an act, on which our liberties depend.

I recoil from an interpretation, which might, in many venial caſes, render any reſort to the protection of the Habeas Corpus Act, *incompatible* with obedience to the orders of a warrant, which enjoins inſtantaneous removal by the directeſt way; and will not tolerate the leaſt delay, or ſlighteſt circuity of deportation.

How happy his Majeſty's Government ought to feel, that though the attempt was merely ſeeming, the failure has been real,—to withdraw the Priſoner's claims (valeant quantum) to liberation, from the cognizance of thoſe legitimate tribunals, which have ſince ſitten in judgment on them!—that in his preſent infirm ſtate, he is not yet depoſited in an Engliſh dungeon, there to pine, until humanity ſhould induce ſtrangers to become his bail;—or until, (wind and weather, and their own liberality permitting) his friends on this ſide of the water ſhould croſs the Channel for his relief!

If honourable firmneſs in one inſtance, will warrant a preſumption againſt baſeneſs in another, the meaſures taken by Judge JOHNSON, to bring the caſe of his country before

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the Law, rather furniſh proofs of innocence, than imply conſciouſneſs of guilt.

Nor, (to revert to the correſpondence which was read at the chamber of my Lord Chief Juſtice,) is it any anſwer to what I have been urging, to obſerve that the Priſoner might have eſcaped the dangers which have been ſtated, by giving the ſecurity aſcertained by Mr. Marſden;—and meaſured, (as might ſeem, from the letter of Sir Evan,) by the authority of the Under Secretary himſelf; and without the concurrent ſanction of the Lord Lieutenant's pleaſure.

It may be even admitted, that thoſe perils by land and water might have been avoided, by Mr. Juſtice JOHNSON's ſigning the undertaking, preſcribed by Mr. Juſtice Bell.

But, in acceding to either propoſal, he would have recognized an authority to arreſt him;—and thus, if my conſtruction of the ſtatute be a right one, would *pro tanto* have compromiſed the laws and liberties of his country. Nor do I wiſh to diſparage the liberality of the gentleman, who propoſed to Judge JOHNSON to give ſecurity for his appearance. I preſume he gave the ſtatute a conſtruction, which is now ſanctioned by great authority; though it ſtrike my humble underſtanding as being unconſtitutional, and falſe.

I therefore interpret as an indulgence, conduct which might otherwiſe be regarded as a ſpecimen of rigorous ingenuity, and adroit oppreſſion.

I alſo indeed heard, (at my Lord Chief Juſtices,) a third offer made: that if Judge JOHNSON would but confeſs himſelf the author of a libel, he ſhould be gratified in his wiſh for a trial in this country. But even this candid and liberal propoſal, one can conceive that an innocent man might poſſibly reject.

For, when turned to familiar language, ſee what ſeems to be its amount.

"Relieve me from the neceſſity of proving, what perhaps I could not prove. Rebut the preſumption of the Law that you are innocent; and though you may not come out, like Barnardine, *to be hanged*,—confeſs, at leaſt, that you are guilty.—If you do this, take my word for

" for it, you ſhall not go to priſon. On the contrary I " will ſend an iſſue to an *Iriſh* jury, to try and enquire " whether your confeſſion be the truth?—And as for my " Lord Ellenborough's warrant, it ſhall be diſobeyed."

I do not ſay that ſuch was the propoſal: but by a ſimple man it might have been ſo underſtood.

To return from this (not foreign or irrevelant) digreſſion. In declining the juriſdiction of an Engliſh tribunal, Judge JOHNSON may not eſcape puniſhment; nor is it to be intended that he wiſhes to evade it.

On the charge made againſt him, he may be tried in Ireland;—and in this, as in the other part of the United Kingdom, a ſuitable puniſhment would be the conſequence of his conviction:—for the judicial power is not yet abrogated amongſt us.

That if he wrote the libel, he did ſo in Ireland, is plain from this, that he is ſworn to have been there, at, before, and ſince the time, when his offence is laid to have been committed.

That by writing and ſending it, he became ſubject to a proſecution here, may be inferred, as well from authorities directly in the point,—as (without any caſe,) from the mere reaſon of the thing.

For, the writer's ſending of ſuch libel was the *ſine quâ non* to its publicity: and the only act done on his part, procuring another to publiſh; and thereby amounting to a publication by himſelf.

For, not having been in England, he cannot *in any way* have publiſhed there, ſave by conveying thither the manuſcript, from which printed copies were diſperſed.

Now if, on the one hand, this act be not a publiſhing, he is *unconnected* with the fact of publication in England. The *privity* between him and the circulator of the ſcandal is deſtroyed. The fact of publication being eſſential to his guilt, he thus becomes utterly abſolved; and eſcapes puniſhment, only by being innocent of the charge.

On the other hand, if the writing and ſending amount to publication, they muſt do ſo where they occurred. They muſt

muſt do ſo in the place from which the manuſcript has been ſent. Thus, having in Ireland publiſhed the defamation, the wrong-doer may be there convicted, of an offence which he has there completed.

If, (as in the King againſt Doctor Henſey, 1ſt Burrow, 646.) a letter, though intercepted, may be an overt-act of treaſon; and (per Lord Mansfield) one, dated at Twickenham, is an overt-act *in Middleſex*;—and if in Jackſon's caſe, (tried in the King's Bench here,) a letter written in Dublin, and found in the General Poſt-office of that city, was held to be an overt-act of treaſon there,—by inevitable analogy, a libel, put into the Dublin Poſt-office, is there *publiſhed*; nor leſs publiſhed, if delivered to any perſon there. Indeed Comyns's Digeſt, title Libel, Publication, B. 1., puts the matter beyond controverſy.

It is no anſwer, to allege, (nor am I called on to deny,) that if an offender ſent a libel to London, to be publiſhed, it might be his act in that city; if the publication took place there: (1ſt Strange, 77.)

It is ſufficient for my purpoſe, that the writing and ſending amounted to a publication in Ireland; ſo that, though this ſtatute were never paſſed, the writer *need not eſcape puniſhment*; conſequently that his caſe, not coming within the miſchief which is recited, does not require the remedy which is preſcribed;—and that it would be as unneceſſary, as it might be unconſtitutional, to drag a perſon, againſt whom ſuch an accuſation was preferred,—to a diſtant tribunal,—where the eſſential act of publication by *him* could not be alleged really and de facto, but merely by conſtruction of law to have taken place;—where no witneſſes, competent to exculpate him, could be found;—and where he could not, by means of compulſory proceſs, collect any.

Such a conſtruction of the ſtatute would not only, at the expence of the perſonal liberty of the ſubject, give a (perhaps vindictive) proſecuter *electio fori*,—but might countenance his making choice of that tribunal, where the perſon accuſed would have the leaſt chance of a fair trial.

To ſuppoſe the poſſibility of malice, which might lead to harſh and oppreſſive proceedings, on the part of a proſecutor for libel, is not to indulge in any conjecture unſanctioned by the law.

On the contrary, libel was held a public offence at the common law, for the very purpoſe of turning into a gentler and more innoxious channel, that deſire of vengeance, which the ſame law aſcribed to thoſe, who found their reputations ſported with. (4th Bac. Abr. tit. Libel, p. 449, and the authorities there cited.)

Again, that ſending a libel is a publiſhing, at the place from which it is ſent, may be inferred from hence, that not only he who publiſhes (in the ordinary ſenſe,)—but he who procures another to do ſo, is guilty of the publication. (Com. Digeſt, tit. Libel, Publication, B. 1.)

And if guilty, he muſt be ſo, where he perpetrated this act of procurement: though he may, by conſtruction of law, be alſo guilty of the ſame elſewhere. (4th Bac. Abr. 458; and the caſes cited in the margent.)

But what is ſaid by my Lord Coke, ſeems to put the matter beyond doubt; and to aſcertain that the writing and ſending of a libel, conſtitute a publiſhing in the place where thoſe two acts are done. He ſays that if one finds a libel, which concerns a public perſon, he ought to deliver it to a magiſtrate, in order that the libeller may be puniſhed.

Now, if the author had not publiſhed, he would not be a libeller. (Com. Digeſt, tit. Libel, Libeller, C. 1.)

But, in the caſe ſuppoſed by Coke, he has no otherwiſe *publiſhed*, than by ſending a libel which has been intercepted. Therefore writing and ſending muſt amount to publication, at the place from which the libel is ſent.

Be this however as it may, it appears by affidavit, that of this alleged libel, there occurred in Ireland that vernacular ſort of publication, which conſiſts in the diſperſion of printed copies.

And the caſes collected in 3d Bac. Abr. tit. Habeas Corpus, page 13, and in 2d Hawkins, ch. 15, prove that of theſe documents, as they do not contradict the return, we may take notice.

Therefore, even thoſe who diſſent from my application of the authorities which I have cited, muſt admit that there has been a conſummation of the offence in Ireland; and conſequently that the offender is puniſhable here.

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This conſideration ought, at once, to exempt his caſe from the preſent ſtatute. For the miſchief, to which it profeſſes to apply a remedy, is that of offences often remaining unpuniſhed:—and as well on principles of right reaſon, as in favorem libertatis, we muſt conſtrue theſe expreſſions to deſcribe the miſchief of offences remaining unpuniſhed *altogether*. The object of the Legiſlature *muſt* have been to guard againſt *total* impunity, or inadequate puniſhment;—which would not occur, where the party is liable in Ireland, to the penalties of his offence.

As to there having been publications in different places, they all however flowed from *a ſingle* act; the *once* writing, and *once* ſending forth the ſcandal;—and to puniſh the author in London, would be, by aſtuteneſs and technical refinement, to inflict a double puniſhment for a ſingle crime; and ſuppoſe two public Juſtices within the united Realm, inſtead of one.

The writing and ſending are the fundamental and radical offence; from which, and not from any pretended repetitions of it, all the conſequences have ariſen Therefore Ireland having been the ſcene of this offence, is emphatically the proper ſcene for proſecution.

In a word, if the Priſoner wrote the libel, he muſt have done ſo where he was. If this *can* be proved againſt him, he may be puniſhed here. If it *cannot*, there is no evidence of his publiſhing in England. Therefore, he is puniſhable in Ireland; or he is not puniſhable at all.

The *ſixth* recital, in the preamble to the third ſection, is the want of a *ſufficient* proviſion, by the laws (recognizing their diſtinctneſs,) of Great Britain and Ireland reſpectively, for apprehending *ſuch* offenders; and tranſmitting them to that part of the United Kingdom, in which their offences were committed.

This recital ſuggeſts to me the following obſervations.

1ſt That no law is requiſite for tranſmitting an offender, to the iſland in which his treſpaſs was *conſtructively* committed; when he may be puniſhed in that iſland in which it was *actually* perpetrated. And this Act need not be ſo conſtrued, as to ſupply what was not wanted.

2dly. That the words "SUCH *offenders*" are restrictive; and mean those *fugitives*, who had just been specified as the objects of the law. The words may be also properly referred to the class of "*Felons and Malefactors*," already noticed in the same preamble; and to which I do not conceive petty trespassers to belong.

Indeed if persons guilty of torts or misdemeanors be malefactors, it can only be because this latter word is *nomen generalissimum*. But if so, it includes felons: and the last mentioned term must be rejected as superfluous, by those who would extend this Act to misdemeanors.

On the contrary, compatibly with my construction, every word may be significant. Felons and other malefactors may mean persons having committed felonies, *aut alia enormia*. Malefactor may, for aught I know, or have been able to discover, have a precise and technical meaning in the Scottish law. Even if it have not, its introduction into the Act from which it has been transcribed into the present one, might be necessary and useful. That was an Act of regulation between England and Scotland; and there may be, and I believe are offences, atrocious and capital by the Scottish law, which yet are not felonies; if indeed the term felon be *at all* known in that code.

But, 3dly. a suggestion of greater weight is this; that unless we extend the operation of the Act before us to misdemeanors, the recital which I have just extracted will be *false*. For it appears from the sixteenth clause of the English Habeas Corpus Act, that persons charged with capital offences had been theretofore transmitted from England to this country: and the previous legality of such a practice, the Habeas Corpus Act may be thought to recognize. At least, it sanctions a continuance of the usage. Thus before the existence of the statute which we are interpreting, there WAS provision for the transmissal of capital offenders.

But this would be so far from rendering the recital false, that the paragraph would be more untrue, if it stated the law to have provided *insufficiently*, where in fact the law had not provided *at all*.

Then

Then were the antecedent provisions sufficient? for if not, the recital before us will be satisfied; though we should not extend the Act to the case of misdemeanors.—I conceive them to have been *insufficient*.

For, 1st. until the recent statute passed, if the Government of the country where the offender *was*, might transmit him, at least non constat that the Government of the country where he *was not*, could send to fetch him. Thus far then the existing laws were insufficient. The preamble truly recites the insufficiency; and the enacting clauses proceed to supply the defect.

2dly. The practice of transmitting capital offenders, from Great Britain and Ireland, reciprocally to each other, was a usage, between those distinct and independent countries, less referable to their municipal codes, than to their political connexions, and the comitas gentium, or Law of Nations.

The offender was transmitted, not under the warrant of a magistrate, but of a Minister of the Executive, viz. the Secretary: and this warrant was executed, not by a peace officer,---but by another inferior servant of the state, viz. a King's Messenger.

Therefore the Habeas Corpus Act, in permitting such proceedings, rather tolerated so much of the law of nations, than strictly enacted the usage, as a branch of the municipal code.

Let me add, that still less does it directly, or by inevitable construction, recognize the PREVIOUS legitimacy of such a practice.

It is doubtful, *at the least*, whether it does not rather confer a new, than acknowledge a precedent *legal* authority. Without deciding on their previous legality, it sanctions a few innocent usages, *by way of exception*;—whilst it prohibits the continuance of such, as were dangerous and oppressive.

At all events, that justly celebrated statute does not empower magistrates to issue, nor peace officers to execute, warrants for apprehending or transmitting capital offenders. It does not confer, on any person, a right of demanding

manding such a process, *ex debito justitiæ*. It does not authorize to send for the culprit, from the place where he *is not*; but only to remove him from the place in which *he is*. Therefore, though we should restrict the operation of the present statute to such *majora crimina*, still the recital which it contains, might be strictly true;—that the provisions of the law were insufficient in this respect.—Nay, the recital might be true, though the Irish Habeas Corpus Act contained a clause, parallel (mutatis mutandis) to the sixteenth of the English: which, however, it may be highly material to observe, is not the case.

Indeed, that previously to the Act of the 31st Car. II. that legal power did not exist, which, in the case of felonies, I admit the present Act to give, appears from reports of equal authority with any which have been published since: I mean those of Sir Edward Coke; and advert to the case of the Lord Sanchar. There, Robert Carliel, the *principal* felon, (and he was a murderer,) having escaped to Scotland, my Lord Coke expressly lays it down, that "it was impossible by legal process" (of the English law) "to apprehend the body of Carliel, "being in Scotland."

What did the King do?

In the first place, to use the language of this most celebrated of our reporters, "he consulted" (as was right for the Executive to do) "with his Judges;" and from their authoritative opinion he found, that "if this fact should "be left to the ordinary proceedings of the law, Carliel, "*the assassin*, could not be taken."

In the second place, he had, with the best intentions, and for a useful purpose, recourse to the exertion of one of those extraordinary *prerogatives*, the too strained and frequent exercise of which, (cruelly taken advantage of, by the encroaching Commons,) tended to bring his unfortunate son and successor to the block.

He issued his royal "Proclamation;" and, to resume the words of my Lord Coke, the assassin "was taken; not "*by any common power*;—but by means of his Majesty's "royal and *absolute* power only."

The

The Britiſh Conſtitution was as yet unſettled. The Engliſh Government had not yet learned, what the Iriſh Nation, I hope, never will forget;—what, ſo long as it is pronounced from the Bench of Juſtice, need not be taught amidſt the claſh of arms,—that in a free country, the *abſolute* power of an executive is unknown.

The caſe which I have been citing, is in the Reports; part IX. vol V. pages 120 and 121.

The ſeventh and laſt recital of the preamble to the third ſection is, that the enactments which there follow, are for remedy of the miſchiefs precedently enumerated. Therefore, (unleſs theſe enactments be cogently expreſs,) to no caſe which does not come within the miſchief, ſhould the remedy, (to the invaſion of a ſubject's liberty) be applied.

Thus what I have been urging will amount to this; that the *enacting* parts of the fourth ſection, do not *necessarily* ex vi terminorum, or *probably* from the context, apply to the circumſtances before us; while the *recitals* of that, and of the preceding clauſe, inſtead of embracing, will exclude the Priſoner's caſe.

I have not been contending, that the enactments of a ſtatute muſt be ſtrictly commenſurate with its preamble. On the contrary, they may be, and are often, more extenſive. I merely hold, that where theſe latter are not explicit, we may reſort to the preamble to explain them. Where the Legiſlature recites a miſchief, and provides a remedy, the *preſumption* is, that a caſe not within the evil, is not within the cure. Stabitur huic præſumptioni, donec probetur in contrarium;—and *to rebut it*, the enacting words muſt be expreſs. Beſides, the conſtruction which I am reſiſting here, would not ſo properly *extend* the enactments beyond the preamble, as *render them incongruous and inconsistent with it.* The preamble having recited the miſchief of impunity ariſing from eſcape,—remedies it, (ſay my opponents,) by providing for a caſe where there is neither impunity, nor eſcape. And perhaps the caſe of the infamous Rynwick Williams, cited in the third edition of Leach, and alſo in Eaſt's Crown Law, might go to ſhew that I have given too great efficacy to the enacting clauſes of a ſtatute: that theſe are liable to more controul from the preamble, than I have ſuppoſed;—and that the

the letter of a ſtatute (however plain,) ſhall not prevail againſt its ſpirit and general intent.

The determination of the Iriſh Judges, with regard to the White Boy Act, goes alſo to eſtabliſh the ſame ſubordination; of letter to ſpirit; expreſſion to intent.

But did the omiſſion, to inſert a recital which ſhould include the Priſoner's caſe, ariſe from inadvertence, or precipitation?

It would be diſreſpectful to Parliament to ſuppoſe, that they could hurry over an Act of ſuch importance as the preſent, abounding with perplexing and ſlovenly omiſſions.

On the contrary, the preamble to the third ſection, which ſeems accurately drawn, ſtates the caſe of an *eſcape*; and *nothing more*:—being in this reſpect even more confined than the introduction to the firſt clauſe.

Nor if, to meet the caſe of an *eſcape*, the Legiſlature made peculiarly harſh and rigorous proviſions, (trenching on the ordinary rights and privileges of the ſubject,) would it do any thing wholly novel and unprecedented. At leaſt it would attempt nothing ſo unuſual, as a conſtruction embracing the preſent caſe, muſt accompliſh.

Accordingly we learn from Sir William Blackſtone, (4th Com. 298.) that "ſuch as being committed for fe-"lony, have broken priſon, may *not* be admitted to bail: "becauſe this eſcape not only carries with it a preſumption "of their guilt, but is alſo ſuperadding one crime to "another."

The ſame doctrine may be found in 2d Inſtit. 188; and Hale's Pleas of the Crown, 102.

Then whether is it more likely,

Firſt, that the Legiſlature adverted to caſes of an actual and de facto preſence in England,—the commiſſion of a crime there,—and a real or preſumptive eſcape from thence?—and that the Act was intended to nullify this eſcape,—and by fruſtrating its effects, to prevent the total impunity of the flying offender?

Or

Or *secondly*, that they had in contemplation a merely *conſtructive* preſence and guilt in England,—by a perſon who *really* committed, and was reſponſible for, the offence *elſewhere?*—And thus that their object was, not to guard againſt a defiance of the law; but to enhance and multiply penalties for the *ſame offence*;—until the victim, with more reaſon than the firſt-born offender, might exclaim that his puniſhment was greater than he could bear?

To return,—it may not further be improper to remark, that the marginal abſtracts correſpond with the conſtruction which I am giving to this ſtatute. And indeed whether I argue from theſe, from the text, or from the title,—I am diſpoſed to pronounce, that Judge JOHNSON's caſe, not falling within the miſchiefs which are recited, cannot come within the remedy which is preſcribed.

But though, until he be found guilty, the innocence of every man is preſumed, yet this Act does not provide the party accuſed with means of compelling the attendance of witneſſes, to make this innocence appear.

Was this alſo one of thoſe *maculæ, quas incuria fudit?* a merely careleſs, giddy, and forgetful omiſſion?—No. It is not our lot to be ſubject to a Legiſlature, which could thus negligently trifle with thoſe liberties and rights, in aſſerting which, ſo much valuable blood has been often ſhed!—On the contrary, the omiſſion to ſecure to perſons ſituated like Judge JOHNSON, the means of a fair trial, and a full defence, rather juſtifies my concluſion, that Parliament did not mean to extend their ſtatute to his caſe.

Where the offence was really, if at all committed, *there* the moſt material witneſſes are likely to be found: ſo that in the caſe of *migration*, that proceſs might not be neceſſary, which this Act omits to give. Therefore to caſes of migration the Act was intended to apply.

But, (to recur parenthetically to a former topic,) it may be ſaid, that if "*reſide*" be conſtrued (quoad miſdemeanors) to mean a reſidence enſuing on an antecedent removal or eſcape, it muſt in capital caſes alſo ſignify the ſame. Admitted. And where is the miſchief that will enſue? If the felon perpetrated the act in England, and thence eſcaped to

Ireland, he perhaps might go unpuniſhed, if it were not for the 44th of the King. But if at the time of the offence committed he was reſident in Ireland, he muſt have perpetrated it *there*; and could *there* be puniſhed for it.

And even though his offence were acceſſorial to a principal crime committed in England, ſtill he ought to be puniſhed in Ireland; under the ſpirit of the ſtatute of the 2d and 3d of Edward VI. ch. 24; which whilſt it altered the common law, attended to the Conſtitution; and directed that acceſſorial offences ſhould be tried in the county in which they were committed.—A fortiori, ought the offender to be tried here, where he is not charged with having been acceſſory to a crime perpetrated in the neighbouring iſland; but is accuſed of a ſpecies of offence which does not admit of accomplices; and where if culpable, he muſt be a principal, and have conſummated his guilt in Ireland.

But, again, this ſtatute does not provide the means of giving bail in Ireland. Need I prove, that this was an indiſpenſably neceſſary proviſion?—Could an Iriſh magiſtrate, without the ſpecial authority of an Act of Parliament, take bail in a matter not within his juriſdiction? and on a charge which he is not bound to know to be bailable, by the Engliſh or Scottiſh law? How, or to what, would ſuch a recognizance bind the party? By what acts, or what omiſſions, could he forfeit it in this country? Of what Court in Ireland would it be a record? How could Engliſh or Iriſh green wax, or Scotch proceſs iſſue, to levy the amount of this ſhadowy obligation, not to be amongſt the rolls of any Britiſh or Iriſh court?—What ſhould prevent the pleading nul tiel record, to any attempted eſtreat of ſuch a recognizance?

Where the arreſt is under the warrant of a Britiſh magiſtrate, the taking bail in this country by an Iriſh Judge, would be a deluſive and nugatory proceeding; ſubſtantially equivalent to an unqualified diſcharge.

Indeed this part of the caſe appears to me to be ſo plain, that to dwell longer on it might ſeem unneceſſary, if it were not that I have heard it confidently argued; and that the opinion which I have formed upon the point, ſeems at once capable of being incontrovertibly maintained; and

to

to be nearly concluſive on the true conſtruction of this ſtatute.

I therefore would aſk what is a recognizance?

Blackſtone anſwers that "it is an obligation of *record*; "which a man enters into before ſome *court of record*; or "magiſtrate, *duly authorized*." (2d Com. 341.)

I ſhould proceed to inquire whether an obligation, entered into before a court of record in *one* country, thereby becomes an obligation of record in *another*?

Firſt, if it do not, the definition which we have juſt extracted from Blackſtone, will not be ſatisfied. A pretended recognizance, entered into before an Iriſh court, will not be an obligation of record in England. In other words, it will be no recognizance there at all; nor binding as ſuch, on the ſuppoſed cognizor.

But *ſecondly*, if a recognizance entered into before an Iriſh (that is to ſay, juridically, a foreign) court, be an obligation of record in England, then either ſuch recognizance is of more efficacy than the judgment of an Iriſh court; or this latter will alſo create an obligation of record in England.

Then in an action brought in England, on a foreign judgment, the declaration might conclude *prout patet per recordum*: the defendant might plead *nul tiel record*; and on ſuch a judgment, *indebitatus aſſumpſit* would not lie.

But on the contrary, the caſe of Walker v. Witter (1ſt Douglas) aſcertains that prout patet per recordum would be rejected as an improper concluſion; and that the plea of nul tiel record would be equally improper. For both concluſion and plea would erroneouſly imply, that a foreign judgment was a record of a court in Weſtminſter.

And the caſe of Bowles v. Bradſhaw, cited in the notes, proves, if neceſſary, that a judgment of the Iriſh Exchequer is no *Engliſh* record; but a mere ſimple contract; on which indebitatus aſſumpſit may there be brought.

Thus the words "a recognizance entered into before a "court of record"—mean entered into before a court of record, *in the country in which it binds*: and otherwiſe it is no recognizance.

"A recognizance," says Blackstone, "is an obligation "of record."

It must be so: for the King can only take by matter of record.

In England he takes by matter of record there: in Ireland by matter of record in this latter country.

"A recognizance," continues Blackstone, "is not wit-"nessed by the party's seal." (2d Com. 341.)

And why? Because it derives its authenticity from a higher source.

"It is witnessed only by the record of the court." (Ibid.)

In other words, patet per recordum:—and (as Lord Mansfield expresses himself, in the case of Walker v. Witter,) "implicit faith is given to such record."

But his Lordship adds, that "the record of a foreign "court is clearly not that sort of record, to which implicit "faith is given by the courts of Westminster Hall:" subjoining that "the difficulty had arisen, from not fixing ac-"curately *what a court of record is, in the eye of the law.* "That description is confined properly, to certain courts "in England. Foreign courts have not that privilege."

Be it remembered—is a common initial injunction of records. But lex neminem cogit ad impossibilia; and it would be impracticable to remember what never had been known.

Yet those who contend that a man may commit a crime in a country which he has never seen; may fly from thence to another, where he has resided from his birth; and when overtaken, be brought *back* to that which he never quitted; —those I must admit to be consistent with themselves, when they hold that his recognizance may be a record of a court, in which it never was acknowledged or enrolled.

But "a recognizance is an obligation of *record*, either "entered into before some court of record, (being there "taken by its officer) or before a magistrate, *duly authorized*, "—and certified to the court." (2d Bl. Com. 341.)

But if the court of record intended, be an English court, can we suppose that, by the word "magistrate," a foreign magistrate is meant?

An

An Iriſh juſtice of the peace is no magiſtrate in England. He cannot without tranſgreſſing the law, preſume to exerciſe *there*, the moſt inſignificant magiſterial functions.

Will a recognizance, oſtenſibly entered into before him who is no magiſtrate, ſatisfy the definition of an obligation of record, entered into before one who is a magiſtrate?

Shall he, who dare not attempt the loweſt, accompliſh one of the higheſt acts of magiſtracy? or ſhall a perſon before *him*,—that is to ſay *coram non Judice*,—bind himſelf *of record*, and be eſtopped for ever, from contradicting or evading the obligation?

Shall the Engliſh authority, which ſuch a man could not exerciſe in England, flow to him from the circumſtances of his being *out of England*?—Or ſhall an act, performed before an obſcure Iriſh juſtice of the peace, be of record in England, when it would not be ſo, however ſolemnly executed before any of the King's ſuperior courts in Ireland?

I ſay would not be ſo. For I hold that the independence of the King's ſuperior courts in Ireland, acquired in 1782, has not been theoretically forfeited by the Union;—and that the King's Bench in this country, is not miniſterial, or ſubordinate to that of England.

I do not deny that, if *duly authorized*, an Iriſh magiſtrate may take and tranſmit a recognizance to England: ſo that it ſhall become an obligation of record in that country. I merely inſiſt, that towards warranting any ſuch proceeding, an authority by ſtatute muſt be given;—and that none ſuch is conferred by the ſtatute now before us.

Nor does this ſeem to have been an overſight on the part of the Legiſlature. They omitted to give this authority by the third and fourth ſections, becauſe it was not wanted: thoſe clauſes being confined to unbailable offences, and to caſes of eſcape.

Where they choſe to confer ſuch power, they have expreſsly done ſo. I mean by the firſt ſection of this ſtatute; where it is ſpecially provided that the endorſing juſtice ſhall take bail; and deliver the recognizance to the conſtable;—who is *required to receive*, and tranſmit the ſame, to the clerk of the crown of the place where the offender is

to

to appear; and it is farther (and not ſuperfluouſly) enacted, that ſuch recognizance ſhall be good, and effectual in law.

Thus the Legiſlature has evinced, by the proviſions of this firſt ſection, what Law and Reaſon had both ſhewn before,—namely that, without the interpoſition of Parliament, he who has no juriſdiction over the offence, cannot bail the offender: that he who cannot commit another to priſon, is equally incompetent to deliver him to the cuſtody of ſureties: but that an enacting ſtatute is indiſpenſably neceſſary, towards enabling him to take, or to tranſmit a recognizance; and towards requiring thoſe to whom it is tranſmitted, to receive it.

The Legiſlature, I ſay, appears to have decided the queſtion, in providing, by the firſt ſection, that where offences are bailable, the endorſing or other magiſtrate may *take* bail; a proviſion which would be ſuperfluous, if without it the accuſed were entitled to give bail before him.

But the proviſion of this firſt ſection does more than aſcertain the incompetence of the magiſtrate, (unleſs under the authority of its enactments,) to take bail.—It ſhews the attention of Parliament to the privileges of the ſubject.

If then, towards enabling an Iriſh court, or magiſtrate, to take bail, in a caſe of miſdemeanor, circumſtanced like the preſent, it were neceſſary that the Act ſhould contain a clauſe, empowering ſo to do,—can we aſcribe to inadvertence, that no ſuch clauſe is to be found?

I have heard this hinted;—and that it is propoſed to have the Act amended in this reſpect.—That would indeed be a ſerious amendment, whoſe operation was to remove—not a partial and temporary ſuſpenſion of the Habeas Corpus act; but rather its total and abſolute repeal.

The hint has been attributed, with I know not what foundation, to a high and reſpectable law officer of the Crown, who from the commencement of this momentous diſcuſſion to the preſent time, though the proſecution be avowedly a ſtate one, has not once favoured us with his aid or preſence;—ſo that I have had no opportunity of mooting with him the ſubject of this alleged inſinuation.

Indeed

Indeed his abſence was the more to be regretted, becauſe the delicacy of Mr. Solicitor General's ſituation,—ſaid himſelf to be (what he muſt allow me to expreſs my ſorrow that he ever ſhould be,) an object of aggreſſion in the preſent libel,—but neceſſarily deprived us of his truly valuable counſel.

It is not alleged that the Attorney General is indiſpoſed. It cannot be alleged that he has been occupied by buſineſs of greater importance than this before us; nor aſſerted that he has given up a queſtion, argued with ſo much ability and candour by the Prime Serjeant:—and ſtill leſs can it be contended, that—aware of a difference of opinion on the Bench,—he has come forward to remove my difficulties, and bring me over to his ſide.

But why he has been away, I am perſuaded the Attorney General could himſelf moſt ſatisfactorily explain;—and could reconcile his abſence with a ſtrict and honorable obſervance of the duties of his ſtation;—a becoming and merited reſpect for the Court of Exchequer;—and decent reverence of conſideration for a queſtion, deciding on the liberty of one of the Judges of the land; and involving the firſt principles of that free Conſtitution, which his Royal Maſter's coronation oath has pledged him to maintain.

Of all this I am aware; and think it likely that nothing but my own miſapprehenſion could prevent me from perceiving, without the help of explanation, a conſiſtency which may to others be apparent,—between the conduct which in this inſtance he has purſued, and the correct principles which he is in the habit of acting on.

Meantime while performing a duty, which I owe to the importance of the queſtion, and the dignity of the Court, by (I truſt, not indecorouſly or offenſively, though with freedom,) animadverting on a ſeeming omiſſion on the part of Mr. Attorney General, it is ſuperfluous to declare, that as I admire the talents, and profeſſional knowledge of that Gentleman, ſo, in doubting whether on this occaſion, he has been critically correct, I mean no diſparagement of his general character or conduct. Therefore in juſtice to himſelf and me, I confidently expect that he will not be offended.

Nor

Nor will I fear that any thing which I may have urged to day, can be miſrepreſented, or remembered to my injury, by others. I ſhall have rouzed no treacherous enemy into action: and even if I ſhould,—yet knowing how free the country is, in which I live, I cannot ſuppoſe that his hoſtile activity would be ſucceſsful. The free doctrines which I have maintained, I ſhould be ſorry to look on as too bold; —and ſtill ſorrier to conſider as in any degree obſolete. Therefore in promulging them, I cannot riſk incurring the diſpleaſure of thoſe conſtitutional Minds, which have the guidance of the State. Nor, deſcending from the Government and Magnates, to lower circles, could the ſworn enemies of ſlander draw the ſword in ſilence; and, odia in longum jacientes, wait with virulent, relentleſs, and lingering impatience, an opportunity for dark, calumnious, and irreſiſtible revenge.

I know all this. But though the reverſe were true, God forbid that this ſhould deter me from a firm performance of my duty! or that I, emphatically a ſervant of the Conſtitution, ſhould betray my truſt, in order to ſcreen myſelf from danger!

Though, inſtead of living under the free conſtitution of this realm, and the mild adminiſtration of Lord Hardwicke, we were caſt upon worſe governments, and more ſlavish times,—yet God forbid that an Interpreter of the law ſhould thereby be induced to treat the preſent like a ſide bar motion! or that applying ordinary means to extraordinary occaſions, he ſhould freeze the energies of his mind in thoſe cold obſervances and common forms, on whoſe fettering power, Oppreſſion too frequently, and too ſucceſsfully relies.

God forbid that in a criſis like the preſent, though Death, or even Diſhonour were to enſue,—I ſhould withhold my humble, yet ſtrong (though fallible) opinion, that the conſtruction againſt which I am contending, could not prevail, without endangering the liberties of my country.

I have wandered from my ſubject; but am not aſhamed of the digreſſion.

To return,—I never can aſſent to an hypotheſis, (aſcribed, perhaps falſely, to a law officer of the Crown,) which would caſt

caſt an unmerited imputation on our Legiſlature: which might ſeem to bring a charge againſt them, of forging chains for an empire, through mere hurry and inadvertence; and then tardily repairing the miſchief they had done,—when one of the King's Judges had become the victim of their precipitation.

On the contrary I am bound, by my reverence for Parliament, to reſcue them from charges which are deſtitute of foundation; and of which I ſhall always deny the truth:—ſince if true, they might give birth to a train of zealot rights and duties, ſo fierce and monſtrous, that I, for my part, could not contemplate them without horror.

Nor would any future amendment, ſuch as may have been ſuggeſted, diſparage Parliament, or refute the conſtruction for which I argue. On the contrary, when the Legiſlature makes due proviſion for giving bail, I ſhall ſuppoſe them to intend, for the firſt time, to include bailable offences: and when they ſpecifically include miſdemeanors unattended with eſcape, I ſhall hold it right and conſtitutional ſo to do; and that I have been erroneous in deriving any ill effects from ſuch incluſion.

Or if the future ſtatute were declaratory in its nature, I ſhould offer my arguments, my motives, my reſpect, and my fallibility, as my atonement.

In the mean time, with what ſtrange inconſiſtency might we tax the Legiſlature, in ſuppoſing them regardful of the conſtitutional rights of one ſubject, who was to be put to no greater inconvenience, than that of being brought from one county to the next,—and utterly negligent, at the ſame time, of the privileges of another, who after having been conducted as a priſoner, from one end of Ireland to the other, was then to be hurried beyond ſea, to a diſtant country, a ſtrange tribunal, and a foreign code?

But I have heard it ſaid, that bail may be given in England.—That is to ſay, after dragging a petty offender, from the remoteſt corner of this country, acroſs the Channel,—he is there permitted to ſolicit ſtrangers to be reſponſible for *him*, of whoſe character they know nothing.

It was not amongſt ſtrangers,—but in the narrow and familiar circle of his connexions and acquaintance, that

the great Alfred, the illuſtrious founder of our law, expect-ed a ſubject to find ſureties for his being amenable to juſtice.

In the comparitively unimportant caſe, of a proposed removal from one county to another, we find Parliament ſcrupulouſly attentive to the principle of law, that if bail can be had, it ſhall be taken on the *very ſpot* were the arreſt is made; without obliging the accuſed to ſet his foot within a goal,---or even to go to an adjoining county, in which the offence is alledged to have been committed.

Can we imagine that, in the incomparably more momentous caſe of a propoſed removal beyond ſea, from one iſland to another, the ſame Legiſlature ſhould at once loſe ſight of the privileges of a ſubject, charged with a bailable offence?

Why then, in this latter caſe, does the ſtatute give no authority for taking bail upon the ſpot,—and without removing the party accuſed?

I ſhould anſwer, becauſe in this part of the Act, Parliament had not bailable offences in contemplation;—and therefore ſuch a proviſion would have been ſuperfluous and impertinent.

I am aware how much "abſurdity" has been aſcribed to the opinion, which exempts bailable offences from the operation of this ſection. I know that it has, with reſpectful irony, been propoſed to help the Bœotian intellect of the Iriſh Bench, by a ſubſidiary clauſe, enabling our Judges to underſtand plain Engliſh; and enacting that the *whole* compriſes all the *parts*. I know too that it has been exultingly enquired, how Parliament could have conveyed, more explicitly than has been done, its intention of embracing caſes of miſdemeanor? The pride of this triumphant queſtion, a ſimple anſwer will put down; viz. that by introducing this very word *miſdemeanor*, the Legiſlature would have been more explicit; and have done away all doubt.

Meantime agreeably to a conſtruction, by which in defiance of flippant ridicule, I abide, we may obſerve that the preamble to the *firſt* clauſe, which extends to miſdemeanors, adopts an expreſſion, viz. "*offences*," properly enough applicable to inferior tranſgreſſions:—while that of the *third* ſection treats of felons and malefactors; and that

of

of the *fourth* of perſons guilty, not of offences, but of *crimes*: thus ſuggeſting, that Criminal and Malefactor are ſynonymous.

Therefore what is to be done?—For *firſt*, a man arreſted for a bailable offence, muſt not be exiled from his country, and caſt into a foreign priſon; under an Act which does not order a committal without bail; and in contravention of the letter and ſpirit of the Habeas Corpus law; which has been juſtly deemed a modern and ſupplemental Magna Charta.

But *ſecondly*, bail cannot be taken *here*. Therefore the Conſtitution muſt be violated; or the priſoner muſt be diſcharged.

But, ſay the Counſel for the Crown, the proper time for bailing is, when the party ſhall have appeared and pleaded.

Here again the Habeas Corpus act is repealed by implication: and this, not by the makers, but by the interpreters of the law. It is repealed, not by the legiſlative, but by the judicial power.

A party arreſted here, ſues out his Habeas Corpus.—The return ſhews him to ſtand charged with a merely bailable offence; and the Act, under which the writ was iſſued, directs that bail ſhall be received.—But Counſel for the Crown produce the 44th of the King; and ſay, "you can-"not be diſcharged on bail *here*, where you have been ap-"prehended. You muſt go to England *in cloſe cuſtody*; "there to appear and plead; and *poſſibly*, (but very *impro-"bably*,) be bailed."

Let him who can, reconcile this doctrine with what Judge Blackſtone has laid down, 4th Com. 297; that not only to refuſe, but to "DELAY to bail any perſon bailable, is an "offence againſt the liberty of the ſubject;—

"*Firſt*, by the common law:—*ſecondly*, by the ſtatute of "Weſtminſter; and *thirdly*, by the Habeas corpus act."

Again, this being a penal Act, ſhould receive a ſtrict conſtruction: an expoſition in advancement, not reſtraint of the perſonal liberty of the ſubject.

The diſtinction between penal and remedial ſtatutes, is not ſo obvious as might at firſt appear. On the contrary,

the ſame Act often partakes of both deſcriptions; and to different parts of it, different rules of conſtruction will apply.

It is ſaid that this Act merely renders perſons amenable to juſtice.

But we have ſeen, that the conſtruction which I am reſiſting would do more. It would turn innocence to guilt; and puniſh, by retroſpection, the criminality which it thus created.

Secondly, it may be a hardſhip, to render perſons amenable more than once, for ſubſtantially one offence:—and amenable to the juriſdiction of that particular tribunal, which the proſecutor ſhall vexatiouſly think proper to ſelect.

Thirdly, even ſuppoſing the end to be remedial, yet if the means be penal, which the ſtatute has deviſed for its attainment, the clauſes which enact theſe *means*, ſhould receive a ſtrict conſtruction.

The expence, and irkſomeneſs, and danger, and diſgrace, of a long impriſonment, and ignominious removal to a foreign country,—together with the difficulties, and aggravated coſts attending the party's defence of himſelf there,—are not theſe, I would aſk my Brethren, ſo many penalties?

And if we extend the third and fourth ſections to the caſe of trivial miſdemeanors, may not theſe amercements inflict upon a perſon ultimately acquitted, a more tedious impriſonment, and heavier fine, than could have enſued upon conviction, if he had been tried at home; ſo as to leave the abſolved wretch nothing better to communicate, to an anxious and afflicted family left behind, than was written by the gallant Francis, after the ruinous defeat at Pavia,—*fors l'honneur tout eſt perdu*.

Shall we conſtrue theſe clauſes *liberally*, (or perhaps I ſhould ſay *illiberally*) in order that ſuch effects may be let in? Or can we ſuppoſe that Parliament intended to enact, what appears to have been ſo obviouſly calculated to produce them?

It

It is true that "ignorantia Juris, *quod quiſque tenetur* "*ſcire*, neminem excuſat."---But the code muſt be jus, *quod teneor ſcire*; or my unwitting tranſgreſſion of it *is* excuſable.

Now, what is the code with which I am bound to be acquainted? That of the country which I inhabit.---I am bound to know, and to obſerve the laws, which afford me protection; and to which, in return for that protection, I owe obedience.

If I viſit Scotland,---while I am a ſojourner there, I ſhall be preſumed to know, and muſt at my peril diſobey, the laws of that country,---to which in my turn I can enforce obedience from thoſe who would tranſgreſs them, to my injury or diſadvantage.

But obſerve the conſequence of maintaining, that by an act done in Ireland, where I am reſident, and from which I do not ſtir, I yet may incur the vengeance of the Scottiſh law.

I write, and ſend ſome letters from Ireland to Scotland; the contents of which are neither libellous nor ſeditious, according to the law, or adjudged caſes in Ireland.---The act which I do, is a publication of thoſe writings: but (as they are not criminal,) it is an innocent act, under the only law, which, whilſt I continue in Ireland, I am bound to know.

But ſuppoſe their import to be defamatory and ſeditious, by the Scottiſh law:---a code of which I am ignorant: and which hitherto I have not thought it eſſential to the ſecurity of my life or liberty, to know.

What *then* will follow, from the conſtruction againſt which I am contending? The moment the letters are received in that country, they are *there publiſhed* by my procurement. A Scotch magiſtrate iſſues his warrant; which an Iriſh juſtice complaiſantly endorſes, and executes againſt me. I am hurried over, in unbailable cuſtody, to Scotland; to be certainly convicted by a *majority* of jurors; and to be tranſported for an act, which was an innocent one, by the laws of the country where it was done.

This

This privilege of being tranſported for a miſdemeanor, formed no item in the liſt of advantages, which we were promiſed by the Union.

That Conſtitution would hold *wickedly* incongruous doctrines, which ſhould ſay, "you ſhall be puniſhed for "tranſgreſſing a law which you are not bound to know; "and within the ſheltering influence of which you do not "live."

It would be like holding that a blind man ſhould not be preſumed to know that he was on the brink of a precipice; but if he fell and periſhed, muſt be conſidered as felo de ſe: or might be compared to refuſing him the benefit of clergy, becauſe he could not read.

Counſel for the Crown indirectly admit the unreaſonableneſs and injuſtice of ſuch a doctrine.

For the argument which they uſe, to reconcile the omiſſion (in the 44th of the King,) to provide for the party's giving bail where he is arreſted,—is the ignorance imputed to the magiſtrates of that diſtrict, of the code which the culprit is charged to have tranſgreſſed.

But why is this ignorance imputed to them?—Becauſe it is not the code under which they live; or conſequently, with which they are bound to be acquainted.—Then whence comes the enlightening beam, which while it is denied to the magiſtrate, illuminates the mind of the ſuppoſed offender?

Shall ignorance of the law of England, preclude the Iriſh magiſtrate from taking bail, for what ſeems to be no more than a miſdemeanor?—And ſhall not the ſame ignorance protect the Iriſh ſubject—from being committed to cuſtody, and dragged out of his country, on a charge of having broken laws, with which he muſt be preſumed to be equally unacquainted?

To return,—while I remain beyond the Scottiſh territory, I am not *bound* to know its law; and the *preſumption* ſhould be, that I am unacquainted with it. Therefore to hold me reſponſible to its proviſions, is to make me a wretched and an abject ſlave; for *miſera eſt ſervitus, ubi jus eſt vagum aut incognitum.*

Neither

Neither would the exemptions for which I am contending, expoſe Scotland to being inundated with libels of Iriſh fabric.—For though the *innocent offender* eſcape, the *offence* will not remain unpuniſhed: nor may it perhaps be here immaterial to remark, that the recital contained in the ſtatute, is not that the *offender*, but the *offence*, eſcapes unpuniſhed.

He who publiſhes in Scotland, knowingly tranſgreſſes a law, with which he is bound to be acquainted. Therefore, conſiſtently with legal principles, and with moral juſtice, there may be inflicted on *him*, a puniſhment which will vindicate the law;---deter others from a repetition of the like offence;---and prevent a miſchief, which by the way is little likely to occur;---and which though it were, it might be better to endure, than deprive millions of the King's ſubjects, of their Liberties, and Conſtitution.

If the paper which was compoſed in Ireland, were allowable by its laws, who could lament that this innocent and inadvertent tranſgreſſion of a foreign code, ſhould remain unpuniſhed?

If, on the other hand, in writing it, the compoſer tranſgreſſed the law of Ireland, he is there anſwerable, as a freeman ſhould be, *juri ſibi cognito*;---and the effect of the conſtruction which I am reſiſting, is not to obviate an impunity, which need not occur; but to try and puniſh a man by a law, under which he does not live.

Though theſe iſlands be legiſlatively united, they are juridically diſtinct.

Their ſtatute law differs in many reſpects: ſome diſſimilarity is, for example, to be found in their criminal code; and eſpecially in that branch of it, which relates to miſdemeanors.

But what ſay thoſe, who maintain a conſtruction, different from mine?

They muſt ſay this.

"What we call a libel, you wrote and publiſhed, (it is "true,) in Ireland. But by the ſame act, ſome copies "found their way into England and Scotland. So far as "you have been concerned, no doubt the publication was

"but

" but a ſingle act. But look at it in this multiplying mir-
" ror, which we have manufactured out of the 44th of the
" King, and you will find it reflected into three offences;
" liable to three puniſhments ; and

"Our great revenge has ſtomach for them all."

" Thus you are at leaſt three times as guilty, as you could
" have been before the Union.

" You cannot indeed, in the caſe of a capital felony,
" have execution three times done upon you. But, in
" miſdemeanor, the courſe is clear and eaſy. It is a com-
" mon ſum in arithmetic. Aſcertain what would be an
" adequate puniſhment for your offence, and this, multi-
" plied by three, will give the minimum of penalty, under
" our conſtruction of the preſent Act.---For example, in-
" ſtead of two years impriſonment, and a fine of 1000*l.*
" you ſhall be impriſoned for ſix years, and pay 3000*l.*
" beſides the irkſomeneſs and heavy coſts of two long
" journies, and a voyage beyond ſea; together with the
" expences of the two trials de incremento, which the
" Union, and 44th of the King, will have ſecured you.

" It is true that this conſtruction not only repeals the
" maxim that pro eâdem cauſâ nemo debet bis vexari,—
" but may operate to puniſh *miſdemeanors*, (even where
" they do not amount to a breach of the peace,) by im-
" priſonment for life, and confiſcation of all property,
" real and perſonal, of the offender. Nay he may be
" utterly ruined by an acquittal. But will not this tend
" to prevent others from offending in the like manner?"

This preventive end is certainly a good one. I ſhould only doubt whether it might not be too dearly purchaſed, by a ſurrender of the moſt valuable birthrights of the ſubjects.

Far from denying the efficacy of this multiplying mirror, I ſhould rather tremble at its power. I ſhould fear that it might operate like thoſe of Archimedes; by quickly and utterly conſuming our Liberties, and Conſtitution.

Why drag the Iriſhman, who had never quitted Ireland, to London, for an offence alleged to have been committed by him, conſtructively preſent there?

Forſooth,

Forſooth, becauſe Ireland is a part of the United Kingdom.

Why try him afterwards in Ireland, and a third time in Scotland, for the ſame prolific act? feaſting each time on his anguiſh; and ſneering at his vain plea of *autrefois acquit*?

Becauſe, for the purpoſe of oppreſſing the ſubject, Ireland has again recovered her diſtinctneſs.

The Legiſlature can never have intended this: and we libel Parliament, by giving their ſtatute ſo vexatious a conſtruction.

We will (ſay ſuch expounders,) conſider the iſlands as united, for the purpoſe of trying you where we pleaſe;---and we will conſider them as ſeparate, in order to puniſh you as often, and as exorbitantly as we pleaſe.

But to return, at all riſks, into Scotland.

An Iriſhman there, writes to inform a friend here, of a groſs inſult and injury which he has received;---and inquires what he ought to do in conſequence.

The other, leſs conſulting prudence or morality, than paſſion, falſe punctilio, and friendly zeal, adviſes to call to the houſe of the affronter;---to expoſtulate, and demand an apology for the inſult; and proceed to inflict perſonal chaſtiſement, if refuſed.

This is done accordingly;---and the Iriſhman, apprehended under the endorſed warrant of a Scottiſh magiſtrate, is hurried thither, and there is at the leaſt in ſome danger of being hanged, for the commiſſion of an acceſſorial crime, capital by the laws of that country; where he never ſet his foot, until he went thither to ſuffer death; for breaking laws which he neither lived under, nor knew; and this by an act, not puniſhable (or at leaſt---not ſo heavily penal,) in his own country.

Perhaps I have not ſtated accurately the effect of Scottiſh law;—of which (God avert the conſequences!) I am ignorant enough.

Therefore of the argument which I have juſt been uſing, I cannot eſtimate the force. In fact, in dwelling upon

weightier reaſons, I have not diſdained the tranſient aid of thoſe of inferior ſtrength. When the liberties of my country ſeemed ſinking in the abyſs, to prevent their ſubmerſion, I perhaps might catch at ſtraws. But I truſt I have been able to lay hold on more ſolid materials for reliance: and though from a miſconception of their ſtatute, the wiſe intentions of the Legiſlature were fruſtrated and overwhelmed, —and the Conſtitution of Ireland were to ſounder with them,—that I have clung to a plank, on which my honour may be ſaved.

Do I uſe the language of an advocate?—I truſt I do.—But I am concerned for no individual. I am an advocate, exerting myſelf on behalf of the Conſtitution. Such advocation is more than the privilege,—it is the duty of a Judge; —and the quiddam honorarium which I require,—is to have it remembered that, at all riſks, I ever ſhall defend it.

If on the preſent occaſion I ſupport it with becoming warmth—it may be, that I yet retain the excitation of a ſpeech, which did honour even to the eloquence of Mr. Curran; and gave additional luſtre to the importance, however tranſcendent, of the preſent ſubject:—a ſpeech, which thoſe would be worſe than bad critics, who could miſtake for merely brilliant declamation.

But to return to dryer topics.

I cannot conſent ſo to conſtrue a ſtatute, as that it ſhall impliedly, and by conſtruction, accompliſh that, which perhaps the Legiſlature might heſitate to do expreſsly; viz. not to ſuſpend for a time, and in the caſe of offences preſently dangerous to the State,—but *generally*, and *for ever*, to repeal the proviſions of the Habeas Corpus law.

We are in the habit of leaning ſtrongly againſt the doctrine of conſtructive repeals.—Shall we admit, as an exception to this rule, the propriety of overturning by a ſide wind, the proviſions of the Habeas Corpus act? and diſplacing, by conſtruction, the corner ſtone of our Conſtitution?

The moſt eſſential proviſo of that ſtatute is abrogated here, if the exception of treaſon and felony, which it contains, be extended to miſdemeanors of the moſt trifling nature:

nature:—and the venial offender, though he offer bail, be committed to cloſe cuſtody, and tranſported beyond ſea. I ſay, though he tender bail:—becauſe, for want of an authority given by the preſent Act, ſuch bail, if tendered, could not be received.

Therefore, as the Legiſlature has not provided that bail ſhall be taken from the perſon arreſted, at the place of his apprehenſion, it did not mean to extend this Act to the caſe of bailable offences; and eſpecially not to thoſe unattended with eſcape:—or ſecondly, though we ſhould ſurmiſe the Legiſlature to have ſo intended,—we muſt wait for *direct* words, before we can effectuate this intention. In the mean time we are not warranted to repeal any law,—and leaſt of all, the Habeas Corpus act and Magna Charta,—by implication.

But it is ſaid that under this Act, the offender may give bail in England.

I repeat *firſt*, that this would not be enough. For, to *delay* receiving bail,—to ſend the accuſed a cloſe priſoner beyond ſea, to find it amongſt ſtrangers,—would be to repeal pro tanto the common law,—the ſtatute of Weſtminſter,—and the Habeas Corpus act.

Secondly, perhaps non conſtat that bail could be received in England; although *I* may be of opinion that it could. At all events, (and which is the only material inquiry,) the words relied on, as enabling the Engliſh magiſtrate to take bail, do not manifeſt a legiſlative intention to include miſdemeanors.

For inſtance;—if the Engliſh magiſtrate had been directed by this ſtatute, to deal with the Priſoner (when tranſmitted) *according to law*:—would it, from ſuch words, be *clear* that the Legiſlature meant to include bailable offences? It certainly would not: and I apprehend that the words made uſe of, are merely equivalent to thoſe which I have ſuppoſed.

Parliament may have meant no more than to prohibit a diſcharge.——If the words had been that the magiſtrate ſhould *proceed with the Priſoner according to law*, he might have been induced to aſk himſelf this queſtion;—"according to what law is it, that I ſhould proceed? If accord

ing to the law, as it ſtood before the paſſing of this Act, "I muſt diſcharge the Priſoner: for until this ſtatute, I had "no authority to detain him. If I am to deal with him ac- "cording to the law created by the preſent Act, then I do "not find it ſpecify what that law is."

Therefore the Legiſlature, expreſſing itſelf more preciſely, ſaid that the magiſtrate, on receiving the tranſmitted priſoner, ſhould "*proceed with him, as if he had been legally appre-* "*hended in England.*"

I am not however called upon to prove, that theſe words might not give authority to bail, if the Legiſlature meant to comprehend bailable offences. It is enough for me, to ſhew that ſuch expreſſions do not imply an intention to include them; nor rebut the preſumption, which tota lege inſpecta will ariſe, that the ſtatute was not meant to extend to miſdemeanors. For though we reſtrict the operation of the law to felonies, the language adopted will be preferable to the words "*according to law*" (which I have ſuppoſed;) as more free from doubt, and more preciſely definitive, of the authority which the magiſtrate is permitted to exert.

But why ſhould we, contra libertatem, ſtrain thoſe expreſſions into evidence of an intention to include miſdemeanors, and reject another inference, more deducible from them, and which would at leaſt exclude ſuch as were not accompanied by a real or *quaſi* eſcape?—I have already in a former part of my argument obſerved, that the words "*as if the perſon had been legally apprehended in England,*" ſeem nearly tantamount to theſe,—*as if he had not withdrawn himſelf from thence.*

Again, how do the words relied on empower, (if they do ſo) the Engliſh magiſtrate to take bail? No otherwiſe than by reference to, and recognition of the law of England, that for a miſdemeanor, bail ſhall be taken, where the accuſed is apprehended.—But is not this the law of Ireland alſo?—And if it be, how can we ſend Judge JOHNSON a cloſe priſoner to England, under a charge of miſdemeanor, —and by virtue of an Act, which does not expreſsly prohibit the admitting him to bail? It is true he cannot be bailed here. But does it follow that he ſhould be tranſ-

mitted?

ſhitted? or may it not rather follow that he ought to be enlarged?

To reſume: the Iriſh Habeas corpus act is nearly copied from the Engliſh One clauſe in the latter, does not however, (nor its parallel) occur in ours. That clauſe makes it highly penal to remove a priſoner from England, to Scotland, Ireland, Jerſey, Guernſey, Tangier, or any other places beyond the ſea. The cauſe of this omiſſion it may not be eaſy to aſcertain. Perhaps a confidence in the Government, founded on the conſtitutional conduct of his preſent Majeſty's illuſtrious houſe. Perhaps that the foreign parts which I have mentioned, were dependencies, not of this country, but of England. But let the cauſe of the omiſſion have been what it may, can we doubt that the ſpirit of the omitted clauſe ſhould be conſidered as pervading the Iriſh ſtatute?

What then does this ſection of the Engliſh act denote? A conſtitutional jealouſy, entertained by the Legiſlature, (or rather by the Commons,) and which ſeems particularly pointed againſt a practice of conveying perſons beyond ſea, —which had obtained, in the times immediately preceding this important Act.

This clauſe is the more remarkable, becauſe it follows one, which provides that the Habeas Corpus ſhall run *into thoſe very iſlands* of Jerſey and Guernſey, to which, (ſo averſe were the framers to trips beyond the ſea,) it is, notwithſtanding, forbidden to ſend any Engliſhman a priſoner.

The title of the Act alſo ſhews the ſame jealouſy; which it now ſeems ſo much the faſhion to lay aſide.

It is entitled "An Act for better ſecuring the liberty "of the Subject; and for *prevention of impriſonments be-* "*yond Sea.*"

I may here briefly obſerve, that in the courſe of the preſent diſcuſſion, three ſtatutes have been repeatedly referred to; viz. the 13th of the King, ch. 31; the 23d of George II. ch. 26; and 24th of the ſame reign, ch. 55.

As to theſe Acts, I admit *with* the Counſel for the Crown,—and I *rely on it* againſt them,—that they were the rudiments of the preſent ſtatute.

I am

I am alſo ready to admit, what they farther have inſiſted, that thoſe Acts eſtabliſh, between the diſtricts of England and Scotland, and counties of Great Britain, the ſame law, which the preſent ſtatute has created for the interior of Ireland; and between the Britiſh iſlands.

But if the combined preambles of the 23d and 24th of George II. be held to differ from the general preamble of the 44th of the King, (which I hold, and have already ſhewn that they do not;) then the ſame law is *not* adopted between the counties of Ireland, by the latter Act, as was eſtabliſhed between thoſe of Great Britain, by the two preceding.

For *there*, clearly there muſt have been an eſcape, or migration, after offence: though whether before or after warrant, became (by the 24th of George II.) immaterial.

I ſay there muſt have been a removal. For the enacting words of the 24th of George II. are not *enlarging*. They do not apply generally to "*any perſon*;" but only to one, *againſt whom* "*a warrant ſhall be iſſued*." Thus theſe latter reſtrictive words connect the enactments with the preamble; and link both to the ſtatute of the antecedent year.

Now no reaſon can be aſſigned for ſuch a difference of law, as ſhould diſpenſe with the neceſſity of eſcape between the Iriſh counties; but ſhould hold it indiſpenſable as between the ſhires of the adjoining iſland.

We therefore ought to reject a conſtruction of the 44th of the preſent King, which introduces ſo unaccountable, and irrational a diſtinction.

But with what force, (I would aſk,) do the Counſel for the Crown cite the Acts which I have noticed, by way of refuting my expoſition of the one before us?

For no adjudication on the conſtruction of thoſe ſtatutes has been quoted: and until the contrary be ſhewn, I may preſume that they have not been ſo interpreted, as by analogy to extend the preſent Act to Mr. Juſtice JOHNSON. For until it be ſhewn, I will not preſume that any Act has been ſo conſtrued, as (according to my ideas,) to infringe the Conſtitution.

And

And as to the 13th of the King, which I admit to be the immediate parent of the Act in queſtion, how does Blackſtone, (remarkable for the accuracy of his deſcriptions,) delineate its effects, in 4th Com. 292?

"And now" (ſays he) "by the ſtatute of the 13th "George III. ch. 31. any warrant for apprehending an "Engliſh offender, who may have ESCAPED into Scotland, "or vice verſâ, may be endorſed and executed by the "local magiſtrates; and the offender conveyed BACK," (obſerve the expreſſion,) "to that part of the United "Kingdoms, in which ſuch offence was committed."

Can a man have *escaped* to a place, in which he has remained from his birth?—or be conveyed *back* to a country, in which he never was before?

Thus Blackſtone's interpretation of the 13th of the King ſuſtains my doctrine, that the 44th applies only to migrations. For the Counſel for the Crown aſſert that this is the legitimate offspring of the former; and vehemently inſiſt on its cloſe reſemblance to the parent ſtatute.

To return: the enactments of the third and fourth ſections are the ſame; except that the former relates to eſcapes into Ireland, from Great Britain; and the latter to elopements vice verſâ.

Therefore we cannot conſtrue the fourth clauſe to authorize the removal to England, of a perſon arreſted here, under the warrant of a Britiſh magiſtrate, for a miſdemeanor,—without at the ſame time holding that the third ſection will juſtify the like removal, of one ſimilarly circumſtanced—to Ireland.

Will the Judges of England be ever induced to concur in this conſtruction?

I paſs over the ſlighter conſequences of ſuch an expoſition:—for inſtance, the exile of their greateſt men, under the fiat of an Iriſh trading juſtice, endorſed by an Engliſh magiſtrate of the like reſpectable deſcription: the removal of their Speaker from the Chair,—or their Chancellor from the Woolſack,—to anſwer for having by letter animadverted with too much freedom, on the conduct

duct of ſome not humble, though obſcure retainer, of the Iriſh Government.

I advert to no ſuch comparatively inſignificant effects as theſe:—but to that direct repeal of the Engliſh Habeas Corpus Act, which ſuch a conſtruction of this third ſection muſt involve.

Will the Engliſh Judges ſo expound the ſtatute now under conſideration, as that an inhabitant of England, who is no convicted felon, and has not been charged with any capital offence, ſhall yet be ſent a priſoner to Ireland?—What would thoſe Judges think of the promptitude of an officer, who conceived it his duty to refuſe the priſoner time to obtain his Habeas Corpus? or in what light would they view the apprehenſions of a Crown lawyer, that ſuch delay, though conceded to the requeſt of the man in cuſtody, might expoſe the conſtable and his aſſiſtants to an action of falſe impriſonment?

That the Act under conſideration, according to the conſtruction which I reject, operates on individuals, with a rigour diſproportionate to their alleged offences, is but an inferior reaſon againſt interpreting it ſo. A more ſolid and formidable objection is, that ſo conſtrued, it might be wielded as an inſtrument of oppreſſion.

We may exult that George the Third is on the throne; and that his gracious diſpoſitions are repreſented by Lord Hardwicke: but we are bound to maintain the checks of our well guarded Conſtitution, againſt evil times, and arbitrary rulers.

We are therefore not to overlook what appears upon the record: namely, that the preſent is a ſort of State proſecution; for an alleged libel on the executive Government of this country.

We are not to forget, that what is contended for by the ſervants of the Crown is, that the Habeas Corpus Act ſhall be ineffectual to procure the enlargement of one, who has incurred their diſpleaſure, by the ſuppoſed commiſſion of one of the loweſt bailable offences:—by the publication of what, (having no judicial knowledge of its contents,) we want the means of pronouncing to be untrue.

We, the legitimate expounders of the lex terræ, and eſpecially called on to give efficacy to thoſe laws, which form an entrenchment round the liberties of our country,—are bound to aſk ourſelves, what motive the ſervants of the Crown might in arbitrary periods have, for ignominiouſly ſending as a priſoner, to another country, a man placed in one of the moſt dignified ſituations amongſt the magiſtracy,—whilſt as yet his innocence of any crime muſt be preſumed; and when the ſuffering him to remain at home, ſo far from producing a failure of juſtice, would ſubject him to the juriſdictions of the country, where his offence, if any, was committed: where the merits of his caſe could be moſt fairly tried:—where his defence could be moſt advantageouſly made;—and his innocence, if he were innocent, moſt eaſily made appear:—where amongſt friends he could find ſecurity, to exempt him from a priſon:—where, if acquitted he would be unpuniſhed;—and if convicted, his puniſhment would be proportionate to his offence.

The anſwer to theſe queſtions, as to the probable motives of a Government, in times unlike the preſent, might guide to a determination of the matter now before us.

Though the topic be a delicate one, I alſo feel it to be a duty, (to which all conſiderations of mere delicacy ſhould give way,) to obſerve that the priſoner is one of the Judges of the land?

With what view do I make this obſervation?—Shall the Judges be leſs reſponſible to juſtice for their conduct, than the obſcureſt individual of the country?—God forbid!—I am rather diſpoſed to maintain the oppoſite opinion. But it is to be recollected, that in our frame of Government, the Judicial Order forms a diſtinct, and ſort of *barrier* eſtate: and that it is a principle of the firſt importance to our freedom, that this body ſhould be protected from all oppreſſive controul, and jealouſly removed from all ſeductive influence, which the Executive might be tempted to exert.

The Judges ſtand, (at leaſt they may ſtand,) in the breach; and ought manfully to maintain their privileges and independence: leſs for their own ſake, than for that of the Conſtitution. Nor has any thing happened lately in this country, which ſeems calculated to warrant their

slumbering on their posts. Therefore, in the moment in which we find a Judge the object of this proceeding, it illustrates the abuses to which, ill construed, the statute, at some future period, might give rise.

We should remember that it is of emphatic consequence to the public, that the independence of the Bench should exist, not merely in theory, but substantially in practice; and that the Habeas Corpus Act, (which Counsel for the Crown by a side wind would overturn,) is a barrier erected by the patriotism of our ancestors, against the encroachments of the Crown: encroachments as likely to be made, if at all attempted, upon the Judges of the land, (those impediments to despotic rule,) as upon any other Order in the State.

On the whole, I consider this, as perhaps the most vital question which I have been ever called on to discuss. A more important one, than I ever expected to find submitted to me; a more critical one, than I hope I shall ever have to investigate again.

If the Judges reject my construction of this Act, I shall bow to their interpretation, as the true one:—and my deference for Parliament will prevent me from pronouncing, that so expounded, the statute is oppressive.

But, while the question is yet open, I may avow my opinion, that the provisions, which a construction different from mine must introduce, would tend to shake our Liberties and Constitution to their foundations.

I admit that they might equally affect the liberties of England. But the proud and enlightened magistrates of that country will, I am persuaded, assert theirs with sufficient boldness.

I for my part confess, that my first anxiety is for the honour, the freedom, and the welfare of my native land.

Indeed the silence with which the event of this arrest has been received, might lead one to infer that I have been exaggerating its importance; and that the transaction is less momentous, than I conceive, or represent it.

But the test afforded by such silence might, in times less fortunate than ours, become highly dangerous and fallacious: and therefore it is unsafe to resort to it at all.

We

We cannot have forgotten how profound the silence was, which the Moniteur observed on a far different occasion: dissimilar to what, while our laws are rightly construed, can ever disgrace or terrify this country.

I mean the apprehension of the late Duke d'Enghien; when he was hurried from a foreign territory into that of France, by the persons exercising the powers of Government there,---to be tried by a law with which he was unacquainted,---for a crime alleged to have been committed in a country where he had not been.

The silence *there* may have originated in terror or corruption. But I have already protested against the sophistry of deriving conclusions from the virtues of our Sovereign, the merits of the Viceroy, or circumstances of the day.

We therefore should, on the contrary remember, that in this country like causes may produce the like effects; as our history shews them to have done in evil days; which might recur.

If this were ever hereafter to be the case, would not such frightful stillness supply an argument, more impressive and eloquent than words could frame, to prove how alarmingly constitutional an occurrence must be, of which the Press did not venture to take notice.

I know that some will be, or affect to be, surprised by the tone which I have thought it proper to assume. There may indeed be a tame, and creeping, and tradesman-like mode of administering the law conceived: but it is not one which meets my ideas of the duties or station of a Judge. Laws are but means: and though it be not our province to legislate, but to interpret,—yet should we not forget, or fail to further, the end and object of those laws; which we are called upon to construe: namely the preservation of public morals; the promotion of social order; and the establishment of good Government, of our Liberties, and of the Constitution. Nor would it be possible that any laws, whose direct and obvious tendency was to overwhelm this latter, could flow from the only source, which should give them force and authenticity; viz. from the true principles and spirit of the Constitution.

Therefore I repeat, that where the words of a statute are ambiguous, I shall always hold that so to construe them as to work oppression, is to interpret them falsely.

Beſides, the ſtatute which we are expounding, may be conſidered as in ſome degree conſequential to the Union: a meaſure which, (let me without egotiſm, be permitted to recollect that,) while a member of the Legiſlature, I ſupported.

If that arrangement, now the law of the land, and as ſuch entitled to our (and eſpecially to my) reſpect, ſhould, as may happen to the beſt meaſures, be abuſed,—ſtill, ſo long as I was not an accomplice in them, I ſhould not hold myſelf reſponſible for thoſe abuſes; nor culpable for having unwittingly contributed to produce them, by being party to a league, from which they need not have ariſen.

But the United Parliament never will enact what, rightly conſtrued, can be ſubverſive of Iriſh freedom. How therefore can abuſes in the ſtatute law ſpring up, unleſs through miſinterpretations, proceeding from the Bench? Or how could I pretend to an unblemiſhed character or tranquil mind, if I were adviſedly to lend my hand to a perverſion of that compact, which I fondly conſidered as enſuring the happineſs of Ireland,—and in the formation of which I therefore actively concurred? How indeed could I look for pardon from my God, if by (what ſtrikes me as) the forced conſtruction of a corollary ſtatute, I ſhould effect the degradation and enſlavement of my country?

No. Let us leave the Habeas Corpus Act untouched: the Union on the liberal baſis, on which, when carried, it was placed: the Conſtitution in the ſtate, in which our brave Anceſtors bequeathed it. We are not likely to render our liberties more ſecure, by alteration. To the raſh Innovator who attempted it, I ſhould be diſpoſed to exclaim, in the ominous and emphatic language of the Roman Centurion, "*ſigniſer ſtatue ſignum:* HIC MANE-MUS OPTIME."

Theſe were the obſervations which I had to make. In entering ſo far upon the ſubject to which they apply, I may have wearied my hearers:—but I have ſatisfied my conſcience.

Mr.

Mr. Baron GEORGE.

In this case I am of opinion with Baron M'Cleland. How the motion now before the Court shall be ruled seems to be a matter of great concern to the Defendant, and in its discussion many great questions have been introduced, on that account I came this day prepared to deliver my sentiments in some method; but the line of argument I had proposed seems ill-suited to this late hour, I shall therefore offer but a very few arguments: I shall pass over the return that has been made to this writ, and the several English acts from which that of the 44th of the King is taken, by saying, that I concur in the observations Baron M'Cleland has made upon them.

We must observe that the Legislature studies to avoid all ambiguity in wording Statutes which authorize arrests—— Acts which authorize Magistrates and Constables to commit, or to arrest, do in general shew them their duty in plain terms, and so furnish such as intend to act well with an explicit and certain justification; but any Statute calling on Peace Officers to act, and yet leaving it doubtful to them and to others whether they had any authority would be a reproach to legislation.

The council for Defendant have argued that the act of the 44th of the King is of this last description, for after denying to it the extent which it expresses to have, the council are not agreed among themselves what the classes of crimes, or of offenders are, which fall within in: At one time it is said, that the Habeas Corpus Act is infringed if this act extends beyond Capital Cases;—next it is said that this act extends to Felonies, and unbailable Cases only:—Again, that if this act extends beyond Felonies, it comprises such misdemeanors only as are committed by *actual* and not by *constructive* presence;—and that without *escape* no warrant can be endorsed here for an offence committed in England—they have not drawn any line in which they all agree this act is bounded. But, as I think, all this uncertainty arises, from denying to the word of this Statute, their plain and express meaning, which seems to have left nothing to construction; and extends, in express turns, to *all* persons against whom a warrant shall be granted for *any crime* or *offence*.

But

Lord CHIEF BARON:

This caſe has been ſo fully and ably diſcuſſed both on the one ſide and the other, that very little remains to ſay for him who comes laſt; and to ſay any thing at all requires no ſmall degree of ſtrength of mind, for before I can apply myſelf to the ſubject, I muſt diſcharge the effects of that faſcinating eloquence which ſtill vibrates upon my ear, has touched, and ſtill acts upon the fineſt feelings of my heart, and has renewed ſome of the pleaſanteſt recollections of my life. And I am not only overpowered by the eloquence which we have heard at the Bar; I muſt alſo try to deliver myſelf from the meſhes of that net, in which the ingenuity and talents of my brother Smith have involved me; and here I am glad to obſerve, that though ſome apprehenſions ſeem to be entertained by him, for the independence of the Iriſh Bench, it is not likely to ſuffer in its reputation for ability—he alone would be ſufficient to avert that danger.

But I confeſs that he has not convinced me—either the razor is too keen—or the block too courſe for me to feel thoſe impreſſions which his arguments have probably made upon men of finer underſtandings, and leſs debilitated conſtitutions. This queſtion has been greatly magnified from the courſe which has been taken, one would be led to believe, that the reſpectable Defendant was now at the Bar to be tried, upon the charge made againſt him. But we are not called upon to pronounce either on his guilt or innocence—that is not the queſtion—we are bound until a verdict has been given to conſider him as innocent, but we are not to give that verdict. The only queſtion before us is, whether a warrant has been granted againſt him, that appears upon the face of the return, and then all we have to enquire is, whether the Iriſh Juſtice was warranted in endorſing the warrant of the Chief Juſtice of England; in my opinion the act is imperative upon him; he had neither the means nor the right to enquire into the guilt or innocence of the party, or into the exility or enormity of the guilt, if any was committed—nor could he enquire, whether the warrant was granted againſt a perſon eſcaping or going into the country in which he receives the warrant—when he ſees the warrant, he is bound by law to endorſe it; the queſtion before

before us then merely amounts to this—is the priſoner in cuſtody under a waraant iſſued by a competent authority in England, and endorſed by a Magiſtrate of competent authority in Ireland? If we take the fourth ſection of the act 44th Geo. III. c. 92, and ſtrip it of the tautology, into which the Legiſlature has fallen; we ſhall find the words of the act to be nearly theſe, "If any perſon or perſons againſt "whom a warrant ſhall be iſſued by a competent authority, "for a crime againſt the laws of England or Scotland, ſhall "eſcape, go into, *or* reſide, or be in Ireland." The warrant ſhall be endorſed by a Magiſtrate, of the place which he has eſcaped or gone into, or where he reſides, or *exiſts*, and under the authority of that warrant, he ſhall be carried to the country from whence it iſſued, and there dealt with, as if he had been there apprehended.

It ſeems to me to be impoſſible to create doubts upon the conſtruction of this clauſe, without the exerciſe of that legal ſubtility which can turn the plaineſt words into ambiguity—and the enacting words can bear no other conſtruction to any plain mind. Moliere was ſaid to read his comedies to an old woman, as to a perſon who would beſt comprehend their obvious force and meaning, and I cannot doubt that if this act were read to any old woman, ſhe would underſtand its proviſions preciſely as I have done.

What then is the objection?—that there is a particular preamble to the enacting clauſe, which is to receive a different conſtruction from the general preamble, and is to controul the generality of the enacting clauſe, and to confine it to the caſe of *eſcape*; but this poſition I cannot admit to be law—the enacting clauſe cannot be controuled by the preamble, unleſs when the enacting clauſe refers expreſsly to the preamble, and here there is no ſuch reference. It was an argument of this kind which excited the indignation of Lord Cowper, who urged, that upon the conſtruction of the Coventry Act, it might with equal force be argued, that inaſmuch as it is recited in the preamble to that act, that the cauſe of paſſing it, was the ſlitting of Sir J. Coventry's noſe; that therefore, the *noſe* only was intended to be protected, and that all the other parts and features of the human body might be maimed and diſfigured with impunity; for, ſays an ingenious Barriſter, the *noſe* only is mentioned in the preamble.

But another objection is raiſed—the ſtatute gives no power of bailing, and therefore it is ſaid, cannot extend to bailable caſes. I deny that ſuch a power is with-held by the law, for its very concluding words are, that upon his arrival in the neareſt county in England, the perſon arreſted ſhall be brought before a Magiſtrate to be dealt with as if arreſted there, that is, "ſhall be bailed, if the charge be "bailable,"—if not, ſhall be tranſmitted in cuſtody to the place where the offence is charged to have been committed.

It is ſaid, that the preamble of the 3d ſection applies alſo to the fourth part which uſes the words "*felons* and other "malefactors;" but the ſame words are uſed in the 13th Geo. III. which clearly extends to miſdemeanors, for it directs, that when the perſon ſhall be brought from Scotland into England, he ſhall be taken before a Juſtice, who ſhall proceed againſt him, as he might have done by the 24th Geo. II. which regulates the proceſs between county and county, and provides for the manner of giving bail, from whence I infer; that notwithſtanding, the arguments at the Bar, the word "Malefactors" includes perſons charged with bailable offences.

The object of the 13th Geo. III. was, to put the criminal proceſs in England and Scotland upon the ſame footing as it ſtood between county and county in England, by the 24th Geo. II.; the 3d and 4th clauſes of the act under diſcuſſion are almoſt preciſely the ſame as the 13th Geo. III. and their object is to put the proceſs in Great Britain and Ireland upon the ſame footing as between county and county in England.—It is ſaid, that monſtrous hardſhips will follow, and I admit ſome curious evils have been pointed out; I am not anſwerable for them—I am not a law-maker—I am only a law-teller.—If I were to ſpeak in a legiſlative capacity, I might perhaps ſay, that I was convinced that ſuch a law ought not to have been made, without further proviſions;—but ſitting where I do, and finding the law ſo made, I muſt act under its direction.

Beſides, all the conſequences which have been ſpoken of with reſpect to Ireland, will follow with reſpect to England and Scotland; and, if the people of England have been leſs tender of the rights of our people than they ought,

ought, this act puts it completely in our power to be even with them.—If they are alive to the liberties of the country, we are not leſs ſo.—No man who has heard the diſplay of eloquence and ability which came from the Bench this day, can ſuppoſe that we are leſs ſo:—and I will not yield, even to my learned and eloquent Brother, in being as feelingly alive to true conſtitutional liberty, as he or any man.—But, if the people of England were ſo alive to the feelings of liberty, how has it happened that they have not, for thirty-two years, repaired, as between England and Scotland, the very miſchief which is now ſaid to exiſt between Great Britain and Ireland?—And this is a ſufficient anſwer to the hints thrown out, that this law was framed for any particular purpoſe—it could not have been ſo intended:—it had been the law between England and Scotland for above thirty years; and when Ireland came to ſtand in the ſame relation to thoſe countries as they had to each other, it was but juſt to aſſimilate the proceedings in the three countries.—No ſuch hardſhips as thoſe ſuggeſted, however, ariſe on the 13th Geo. III. nor has the propriety of that law ever been controverted. As to the opinion, that this act operates as a repeal of the Habeas Corpus law, if it do ſo, I cannot help it, but I do not think it does;—at moſt, it does but ſuſpend it while a priſoneri s *in tranſitu* from one country to the other; and as to the hardſhip, if it exiſts, it is common to the whole empire.—The act is an act of fair reciprocity; there is as much hardſhip in bringing an Engliſhman, without bail, from the Orkneys to the firſt northern county in England, or a Scotchman from the Land's-end in Cornwall to the firſt Scotch county, as in bringing an Iriſhman from Dublin to Holyhead.

I did not think, when I began to deliver my opinion, that I ſhould have been able, from the weak ſtate of my health, to hold out ſo long, but I muſt, in mercy to myſelf, nay, and my audience, conclude;—and, if I have been compelled to omit any of the reaſons which have helped to form my judgment, I truſt I will ſtand excuſed, the more eſpecially, as I feel my opinion to be ſuſtained by that of the Court of King's Bench, and of two out of three of my Brethren.

Counsel for the Prosecution :

ARTHUR BROWN, Esq. Prime Serjeant;

The Right Hon. STANDISH O'GRADY, Attorney General.

AGENT,

Thomas Kemmis, Gent. Crown Solicitor.

Counsel for the Hon. Mr. Justice Johnson:

J. P. CURRAN, Esq.

A. C. M'CARTNEY, Esq.

P. BURROWES, Esq.

J. BALL, Esq.

W. JOHNSON, Esq.

J. B. SCRIVEN, Esq.

J. W. BELL, Esq.

AGENT,

John Swift Emerson, Gent.

APPENDIX.

No. I.

Anno quadragesimo quarto Georgii III. Regis.

CAP. XCII.

An Act to render more easy the apprehending, and bringing to Trial, Offenders escaping from one Part of the United Kingdom to the other, and also from one County to another.

[20th JULY, 1804.]

WHEREAS it frequently happens that persons, against whom Warrants are granted by Justices of Peace for the several counties and places in *Ireland*, escape into other counties or places, out of the jurisdiction of the Justices of Peace granting such Warrants; and it may also frequently happen, that persons having committed offences in some county or place in *Ireland*, may reside or be in some other county or place, out of the jurisdiction of the Justice or Justices of the county or place in which such offence was committed, whereby such offenders may or will easily avoid being punished for the offences wherewith they are charged; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual, and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the first day of *August*, one thousand eight hundred and four, in case any person against whom a Warrant shall be issued by any Justice or Justices of the Peace of any county, city, liberty, town, or place, within *Ireland*, shall escape, go into, reside, or be, in any other county, city, liberty, town, or place, out of the jurisdiction of the Justice or Justices granting such Warrant as aforesaid, it shall and may be lawful for any Justice or Justices of the Peace for the county, city, liberty, town, or place where such person shall escape, go into, reside, or be,

and such Justice or Justices is and are hereby required upon proof being made upon oath of the hand writing of the Justice or Justices granting such warrant, to indorse his or their name or names on such Warrant, which indorsement shall be a sufficient authority to the person or persons bringing such Warrant, and to all other persons to whom such Warrant was originally directed, to execute such Warrant in the county, city, liberty, town, or place, where the same was indorsed, and to apprehend and carry such offender or offenders before the Justice who indorsed such Warrant, or before some other Justice or Justices of such other county, city, liberty, town, or place, where such Warrant was indorsed; and in case the offence for which such offender shall be apprehended shall be bailable in law, and such offender shall be willing and ready to give bail for his or their appearance at the next assizes or general gaol delivery, or next general quarter sessions of the peace to be held in and for the county, city, liberty, town or place, where the offence was committed, such Justice or Justices by whom such Warrant was indorsed, or such other Justice before whom any such offender or offenders shall be brought, shall and may proceed with such offender or offenders, and take bail for his or their appearance at the next assizes or general gaol delivery, or at the next general quarter sessions of the peace to be held in and for the county, city, liberty, town or place, where such offence was committed, in the same manner as the Justices of the Peace of the proper county, city, liberty, town, or place, should or might have done in such proper county, city, liberty, town, or place; and the Justice or Justices so taking bail as aforesaid, shall deliver the recognizance, together with the examination or confession of such offender or offenders, and all other proceedings relating thereto, had before such Justice, to the Constable or other officer or officers, or persons or persons so apprehending such offender or offenders as aforesaid, who are hereby required to receive the same, and to deliver over such recognizance, examination, or other proceedings, to the clerk of the crown or clerk of the peace of the county, city, liberty, town, or place, where such offender or offenders is or are required to appear by virtue of such recognizance; and such recognizance, examination, and confession respectively, shall be as good and effectual in law to all intents and purposes, and of the same force and validity, as if the same had been entered into, taken, or acknowledged, before a Justice or Justices of the Peace in and for the proper county, city, liberty, town, or place, where the offence was committed, and the same proceedings shall be had thereon; and in case any constable, officer, or other person to whom such recognizance, examination, confession, or other proceedings

ings shall be delivered as aforesaid, shall refuse or neglect to deliver over the same to the clerk of the crown or clerk of the peace of the county, city, liberty, town, or place, where such offender is required to appear by virtue of such recognizance, such constable, officer, or other person, shall forfeit the sum of five pounds *Irish* currency, to be recovered against him by bill, civil bill, plaint, or information, in any of His Majesty's Courts of Record in *Ireland*, by any person or persons who will prosecute or sue for the same, wherein no essoign, protection, or wager of law, shall be allowed, nor more than one imparlance; and in case the offence for which such offender or offenders shall be apprehended and taken in manner aforesaid, shall not be bailable in law, or such offender or offenders shall not give bail for his or their appearance at the next assizes or general gaol delivery, or next general quarter sessions of the peace to be held in and for the county, city, liberty, town, or place, where the offence was committed, to the satisfaction of the Justice before whom such offender or offenders shall be brought, then and in such case the constable, officer, or other person so apprehending such offender or offenders, shall carry and convey such offender or offenders before one of His Majesty's Justices of Peace of the proper county, city, liberty, town, or place, where such offence was committed, there to be dealt with according to law.

2. And be it further enacted, that no action of trespass, false imprisonment, or indictment, or other action, shall be brought, sued, commenced, or prosecuted by any person or persons whatsoever, against the Justice or Justices who shall indorse such Warrant, for or by reason of his or their indorsing such Warrant: Provided always, that such person or persons shall be at liberty to bring or prosecute his or their action or suit against the Justice or Justices who originally granted such Warrant, in the same manner as such person or persons might have done in case this act had not been made.

3. And whereas it may frequently happen that felons and other malefactors, in that part of the United Kingdom called *Ireland*, may make their escape into that part of the United Kingdom called *Great Britain*, as also that felons and other malefactors in that part of the United Kingdom called *Great Britain*, may make their escape into that part of the United Kingdom called *Ireland*, whereby their offences often remain unpunished, there being no sufficient provision, by the laws now in force in *Great Britain* and *Ireland* respectively, for apprehending such offenders and transmitting them into that part of the United Kingdom in which their offences were committed: For remedy whereof be it further enacted, that, from and after the first day of

August, one thousand eight hundred and four, if any person or persons against whom a Warrant shall be issued by any of the Judges of His Majesty's Court of King's Bench, or any Justice of Oyer and Terminer or Gaol Delivery, or any Justice or Justices of the Peace or other person having authority to issue the same within *Ireland*, for any crime or offence against the laws in force in *Ireland*, shall escape, go into, reside, or be in any place in *England* or *Scotland* respectively, it shall and may be lawful for any Justice of the Peace of the county, stewartry, riding, division, city, liberty, town, or place in *England* or *Scotland* respectively, whither or where such person or persons shall escape, go into, reside, or be, to indorse his name on such Warrant, which Warrant so indorsed shall be a sufficient authority to the person or persons bringing such Warrant, and to all persons to whom such Warrant was originally directed, and also to all constables or other peace officers of the county, stewartry, riding, division, city, liberty, town, or place, where such Warrant shall be so indorsed, to execute the said Warrant in the county, riding, division, city, liberty, town, or place, where it is so indorsed, by apprehending the person or persons against whom such Warrant is granted, and to convey him, her, or them by the most direct way into *Ireland*, and before one of the Justices of the Peace of the county in *Ireland*, living near the place and in the county where he, she, or they shall arrive and land; which Justice of the Peace is hereby required to proceed with regard to such person or persons as if the said person or persons had been legally apprehended in the said county in *Ireland*.

4. And, for remedy of the like inconveniency by the escape into *Ireland* of persons guilty of crimes in *England* or *Scotland* respectively, be it further enacted, that, from and after the first day of *August*, one thousand eight hundred and four, if any person or persons against whom a Warrant shall be issued by any of the Judges of His Majesty's Court of King's Bench, or of the Courts of Great Sessions in *Wales*, or any Justice of Oyer and Terminer or Gaol Delivery, or any Justice or Justices of the Peace of any county, stewartry, riding, division, city, liberty, town, or place, within *England* or *Scotland* respectively, or other person having authority to issue the same within *England* or *Scotland* respectively, for any crime or offence against the laws of *England* or *Scotland* respectively, shall escape, go into, reside, or be in any place of that part of the United Kingdom called *Ireland*, it shall and may be lawful for any Justice of the Peace of the county or place in *Ireland*, whither or where such person or persons shall escape,

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go into, or reside or be, to indorse his name on such Warrant, which Warrant so indorsed shall be a sufficient authority to the person or persons bringing such Warrant, and to all persons to whom such Warrant was originally directed, and also to all sheriffs officers, constables, and other peace officers, of the county or place in *Ireland* where such Warrant shall be so indorsed, to execute the said Warrant in the county or place in *Ireland* where it is so indorsed, by apprehending the person or persons against whom such Warrant may be granted, and to convey him, her, or them, by the most direct way into *England* or *Scotland* respectively, and before one of the Justices of Peace of the county or stewartry, in *England* or *Scotland* respectively, living near the place and in the county where he, she, or they shall arrive and land, which Justice of Peace is hereby authorized and required to proceed with regard to such person or persons as if such person or persons had been legally apprehended in the said county or stewartry of *England* or *Scotland* respectively.

5. And be it further enacted, that the expence of removing prisoners as aforesaid to any place in *England*, *Scotland*, and *Ireland* respectively, shall be repaid to the person defraying the same by the treasurer of the county in *England* or *Ireland* respectively, or by the sheriff or stewart depute or substitute of the county or stewartry in *Scotland* in which the crime was committed, the amount of such expence being previously ascertained by an account thereof verified upon oath before two of the Justices of the Peace of said county or stewartry, and allowed and signed by them; and such treasurer, sheriff, or stewart depute, or substitute, shall be allowed such payments in their respective accounts.

6. And be it further enacted, that the treasurers of the several counties in *Ireland*, who have paid the amount of any such expences so ascertained as aforesaid, shall lay the said account, together with the allowance of the same so signed as aforesaid, before the Grand Juries of their respective counties, at the assizes holden for such counties next after such expences shall be paid, or at any subsequent assizes; and it shall be lawful for such Grand Juries, and they are hereby respectively required to present a sum equal to the amount of such expences, to be raised from the county at large, for the purpose of reimbursing such treasurers.

7. And whereas it frequently happens, that persons having stolen or otherwise feloniously taken away money, cattle, goods, or other effects, in one of the parts of the United Kingdom, carry

carry the same into another part of the said United Kingdom, and there have the said money, cattle, goods, or other effects, in their possession or custody; and doubts may be entertained whether they could be indicted and tried in that part of the United Kingdom where such offenders have the said money, cattle, goods, and other effects, in their possession or custody, as the original offence was not committed in such part of the said United Kingdom; be it therefore further enacted and declared, that, from and after the first day of *August*, one thousand eight hundred and four, if any person or persons having stolen or otherwise feloniously taken money, cattle, goods, or other effects, in any one of the parts of the said United Kingdom, shall afterwards have the same money, goods, chattels, or other effects, or any part thereof, in his, her, or their posession or custody, in any other part of the United Kingdom, it shall and may be lawful to indict, try, and punish such person or persons, for theft or larceny, in that part of the United Kingdom where he, she, or they shall so have such money, cattle, goods, or other effects, in his, her, or their possession or custody, as if the said money, cattle, goods, or other effects, had been stolen in that part of the United Kingdom.

8. And be it further enacted, that if any person or persons in any one of the parts of the United Kingdom shall hereafter receive or have any cattle, goods, or other effects, stolen or otherwise feloniously taken in any other part of the United Kingdom, knowing the same to have been stolen or otherwise feloniously taken, every such person or persons shall be liable to be indicted, tried, and punished for such offence in that part of the United Kingdom where he, she, or they shall so receive or have the said cattle, goods, or other effects, in the same manner to all intents and purposes as if the said cattle, goods, or other effects, had been originally stolen or otherwise feloniously taken, in that part of the United Kingdom in which such person shall so receive or have such cattle, goods, or other effects respectively.

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No. II.

GEORGE the third, by the Grace of God, of the United Kingdom of Great-Britain and Ireland, King, Defender of the Faith, and soforth, to EDWARD MEDLICOTT greeting, we command you. that you have the body of the Hon. ROBERT JOHNSON detained in your custody, as it is said, under safe and secure conduct, or by whatsoever other name, addition of name or sirname, said ROBERT JOHNSON is called in the same, before the Right Hon. the Chief Justice of our Court of Chief Place in Ireland, at his house in Merrion-square, Dublin, immediately on sight or receipt thereof---together with the day and cause of his the said ROBERT JOHNSON's being so taken and detained, to do and receive what shall then and there be considered concerning him, and have you then and there this writ, witness WILLIAM DOWNES, Esq. at the King's Courts, Dublin, the 28th day of November, in the 45th year of our reign.

Examined by WALTER BOURNE,
Deputy Clk. of the Crown. H. & R. CONWAY.

J. S. EMERSON.

In obedience to the annexed writ, I do hereby certify, that I am a Magistrate and Peace-officer of the county of Dublin, and that I apprehended and arrested and took into my custody, on the 18th day of January, 1805, at Milltown, in the said county, the Hon. ROBERT JOHNSON, in the annexed writ named; and that my authority for so doing was a warrant from the Right Hon. Lord ELLENBOROUGH, Lord Chief Justice of England, duly signed and sealed by him---and which warrant is in my possession, and is in the words and figures following: "England to wit. Whereas, it is certified to me by one of the "clerks in the Crown-office, that the Hon. ROBERT JOHNSON, "late of Westminster, in the county of Middlesex, Esq. one of "the Judges of the Court of Common Pleas in Ireland, stands "indicted in His Majesty's Court of King's Bench, at West-"minster, for certain misdemeanors, in composing, writing, "publishing, and printing, at Westminster aforesaid, certain "scandalous and malicious libels, of and concerning His Ma-"jesty's government of Ireland, the Right Hon. PHILIP, Earl "of HARDWICKE, General and General-governor of Ireland; "the Right Hon. JOHN, Lord REDESDALE, His Majesty's Lord "Chancellor and Keeper of the Great Seal, and one of his "Privy Council of Ireland; and the Hon. CHARLES OSBORNE, "one of the Justices assigned to hold pleas, before the King "himself, in Ireland, against the peace, &c.---to which indict-"ment the said ROBERT JOHNSON hath not as yet appeared. "These are therefore to will and require, and in His Majesty's

"name,

" name, strictly to charge and command you and every of " you on sight hereof to apprehend and take the body of the " said ROBERT JOHNSON, and bring him before me or one " other of the Judges of his Majesty's Court of King's Bench, " if taken in or near the city of London, or Westminster; if " elsewhere, before some Justice of the Peace near to the " place where he shall be herewith taken, to the end that he " may become bound with sufficient sureties for his appea- " rance in his Majesty's Court of King's Bench, at Westmin- " ster, and to plead within the first eight days of next term " to the said indictment, and to try the same at the sitting of " Nisi Prius, to be held after the same term in and for the " county of Middlesex, and personally to appear in the same " court on the return of the postea, in case he shall be con- " victed, and be further dealt with according to law, hereof " fail not at your peril. Given under my hand and seal the " 24th day of November, 1804. ELLENBOROUGH. (Seal.)— " To Edward Williams, gentleman, my tipstaff, and to all " chief and petty constables, headboroughs and tythingmen " and all others whom it may concern." And which Warrant (the said ROBERT JOHNSON having at the time of the perfection thereof, and ever since resided at Milltown aforesaid in the said county) was, previous to the said arrest, duly indorsed with his name by JOHN BELL, Esq. a Justice of the Peace for the said county; and, after I had arrested the said ROBERT JOHNSON under the said Warrant, so indorsed as aforesaid, I brought him before the said JOHN BELL, at Milltown aforesaid, in the county aforesaid, to be dealt with according to law---he, the said JOHN BELL, having been present at the said arrest: and the said ROBERT JOHNSON then and there declined and refused to tender any bail, or to enter into recognizance, although requested so to do by the said JOHN BELL, for the purposes stated in the Warrant of the said Lord Chief Justice, thereupon the said JOHN BELL directed me to detain the said ROBERT JOHNSON in my custody; and, at the same time, handed to me a Warrant, under the hand and seal of the said JOHN BELL, now in my possession, and which is in the words and figures following: " Whereas, a Warrant issued " under the hand and seal of the Right Honorable Lord " ELLENBOROUGH, Lord Chief Justice of England, bearing " date the 24th day of November, 1804, and directed to " EDWARD WILLIAMS, gent. his lordship's tipstaff, and to all " chief and petty constables, headbouroughs, and tythingmen, " and all others whom it may concern, to apprehend and take " the body of the Hon. ROBERT JOHNSON, late of Westmin- " ster, in the county of Middlesex;---and whereas, the said " ROBERT JOHNSON, at the time of issuing of the said War- " rant,

" rant, and ever since, hath resided in the county of Dublin, " in Ireland, and for the purpose of authorizing the execution " of said Warrant I, JOHN BELL, Esq. one of His Majesty's " Justices of the Peace for said county, did duly endorse my " name on the said Warrant;—and whereas, the said Warrant " hath been executed, and the body of the said ROBERT " JOHNSON hath been brought before me accordingly;—and " whereas, the said ROBERT JOHNSON hath declined, and al- " together refused, to give or offer any bail for the purposes " specified in the said Warrant of the said Lord ELLENBO- " ROUGH, or to enter into a recognizane in his own name, for " such purpose, which, by the consent of the Attorney-General, " I offered to accept. These are, therefore, to authorise and " require you forthwith to convey the said ROBERT JOHNSON in " the most direct way into England, and then to bring him be- " fore the next Justice of the Peace, near the place where he " shall arrive or land; and for so doing, the aforesaid Warrant " of the said Lord ELLENBOROUGH, and the endorsement of " my name thereon, and these presents shall be to you and each " of you a sufficient authority. 18th January, 1805. JOHN " BELL. (Seal). To EDWARD MEDLICOTT, Esq. and his " assistants." And I did accordingly take and do still detain the said ROBERT JOHNSON in my custody under the several Warrants and authorities aforesaid, in order to convey him by the most direct way into England; and I did accordingly for that purpose upon the day of his arrest aforesaid and immediately after it bring him into the city of Dublin (being the most direct way from Milltown aforesaid to England) where the said several Warrants were duly endorsed by FREDERICK DARLEY, Esq. a Justice of Peace in and for the said city; and I was then about immediately to proceed to England with the body of the said ROBERT JOHNSON, there to bring him before the next Justice of the Peace near the place where he should arrive and land, when I was served with the annexed Writ, by which I have been delayed from proceeding to England with the said ROBERT JOHNSON, under the several Warrants and Authorities aforesaid, and under the provisions and authority of an act passed in the 44th year of the reign of his present Majesty, entitled, " An Act to render more easy the appre- " hending and bringing to trial offenders escaping from one " part of the United Kingdom to the other, and also from " one county to another." And I do further certify, that I have the body of the said ROBERT JOHNSON on the day and at the place in the said annexed Writ, as by the said Writ I am commanded, so answers EDWARD MEDLICOTT. *

* The Return to the Writ of Habeas Corpus which issued out of the Court of Exchequer, stated in addition *the Rule to Remand*, which was made in the Court of King's Bench.

No. III.

"Objection will not be made to Mr. Justice JOHNSON going "to England in the course of a month—he must be prepared "to give bail then himself in £1000, and two sureties in £500 "each: Adopting this course, it will not be considered neces- "sary to put in force the Warrant of the Chief Justice in "England, under which Mr. Justice JOHNSON might be sent "to England."

No. IV.

"DEAR SIR, "*Dublin Castle, 13th Dec.* 1804."

"On receiving your Note of the 10th Inst. "I expected to have learnt whether Mr. Justice JOHNSON had "determined to proceed to England, as was stated by you to "be his wish to do. Finding that you had not been charged "with any answer, I am desired to request that you will learn "from Mr. Justice JOHNSON, whether it be his intention to go "to England within the time mentioned;—for should this not "be the case, or should he continue to decline charging you "with any answer, such proceedings will be taken, under the "warrant, for his apprehension, as may be directed."

"Yours very truly,

"*To*——." "A. MARSDEN."

No. V.

"SIR,

"In consequence of the state of my health, "by which I have been confined for above two months, and of "the recommendation of my physicians, to make use of the "Bath-waters as soon as I should be able to travel:—A friend "of mine was so good, as to solicit His Excellency the LORD "LIEUTENANT for me, that he would be pleased to grant me per- "mission to go to England; and, at the same time, (from some "rumours I had heard, that it was the intention of His Excel- "lency to cause me to be prosecuted in England for some mis- "demeanor said to be committed by me there,) I did request "of the gentleman, who had undertaken the matter for me, to "express my hope, that His Excellency's known mildness and "humanity would afford me his protection during my stay at "Bath, by an assurance, that no arrest of my person should "take place there; as from my feeble state of health, and ne- "cessary absence from friends and advice, I should be but ill "able, in such a situation, to meet so deep a proof of His Ex- "cellency's displeasure."

"In

"In consequence of this solicitation, two notes were forwarded from Mr. Secretary MARSDEN: though these notes "do not contain any official form, (as from the humble and "private nature of my application they need not) yet, as the "first conveys to me His Excellency's indulgent permission to "go to Bath; coupled, however, with the conditions which he "was pleased to annex, of my giving bail, and also the precise "measure of bail, which the magistrate should take; and, as "the second states, that Mr. Secretary MARSDEN is desired to "require an immediate answer to the first. I cannot have any "doubt that these papers were intended to convey to me His "Excellency's commands. I deem it therefore proper, from "the respect I feel, and the duty I owe to His Excellency, to "request that my answer may be laid before him by you, and "that you will have the goodness to acquaint His Excellency, "that even if His Excellency's permission to me to go to Bath "were unshackled with any condition, it would not be in my "power, in my present enfeebled state of health, to take immediate "advantage of it at this season—and in the present state of the "weather—nor until some favourable alteration, which my "physicians hope for, soon shall take place; and that you will "also have the goodness to say that I am at this moment totally "ignorant (except from vague and general conversation, and "to no greater extent than I have already mentioned) of the "precise nature of the fact with which I am charged, and of "the precise nature of the instruments under which proceedings are threatened against me here—no such matter having "ever come before me in the course of my experience. I "therefore humbly hope, that His Excellency will direct a "copy or copies of such papers or documents, as he may deem "proper, to be given to my Solicitor, that I may have the benefit of legal advice in such a situation—assuring His Excellency, that it is my intent to be directed by the opinion of "impartial and skilful men, and to submit to whatever course "they shall deem right. At present I have nothing to lay "before Counsel but vague rumour, from which it cannot be supposed they can form a proper opinion:—I do not mean, in "making this request, to desire the possession of any secret of "the Crown, as the prosecutor."

"Miltown, near Dublin, "I am, sir,
"17th Dec. 1804." "Your very obedient Servt.

"*To Sir Evan Nepean.*" "ROBERT JOHNSON."

"*Dublin*

No. VI.

"SIR, "*Dublin Castle*, 21*st Dec.* 1804."

"Your letter of the 17th inst. has been delivered to me by your servant, and, in reply to it, I am to inform you, that the communications which have taken place between your friend and Mr. MARSDEN were altogether private; and, therefore, you are not to consider the notes of Mr. MARSDEN, which you very properly observe do not purport to be official, as conveying to you, in any respect, the LORD LIEUTENANT's pleasure. I have, however, no difficulty in saying, that if you are still disposed to go to England, I have no doubt His Excellency, upon a proper application, will be very ready to comply with your wishes; but as to his extending, in that event, a protection against arrest in England for misdemeanors supposed to have been committed by you there, it is, as you must very well know, altogether out of His Excellency's power to afford you any such protection;—however, the apprehension of such arrest, for a bailable offence, cannot, I should presume, constitute any objection to your going to England, according to your original intention, and the proposal of your friend to Mr. MARSDEN; on the contrary, I should suppose you would feel it due to your situation to meet any charge which has been preferred against you, without any appearance of difficulty or delay.

"With respect to the latter part of your letter, which expresses a hope, that His Excellency will direct that your Solicitor may be furnished with copies of certain papers and documents to which you allude, I have only to observe, that no such papers or documents have been transmitted from England—and, therefore, I have thought it altogether unnecessary to submit your letter to the LORD LIEUTENANT's consideration."

"I have the honor to be, sir,

"Your obedient Servant,

"*Mr. Justice Johnson.*" "EVAN NEPEAN."

No. VII.

"SIR,

"I had the honor of receiving your letter of the 21st.—I put you to this second trouble, only to request you will be so good as to excuse me for having taken up your time with my first application, in consequence of a mistake which I perceive I had fallen into. Mr. Sec. MARSDEN's

"notes

"notes having been sent in answer to my application to my "LORD LIEUTENANT for leave of absence; though I knew "them to be so far private as not to contain official forms, yet "I had not then the least doubt they conveyed to me His "Excellency's pleasure. I thought I had obtained His Excel-"lency's leave of absence, but coupled with certain conditions, "which, if performed, it was stated in Mr. MARSDEN's note, "it would 'not be considered necessary to put in force, in "Ireland, the Warrant of the Chief Justice in England, under "which' it was alledged 'Mr. Justice JOHNSON might be sent "to England.' As 'the note mentioned my going to England "in the course of a month,' I did not think it necessary to re-"turn an immediate answer, more particularly as the state of "the weather, and of my health, precluded me from taking "advantage of what I then conceived to be His Excellency's "permission. In two days after, (13th Dec.) Mr. Secretary "MARSDEN again wrote, that 'he was desired to learn' (I "presumed by His Excellency) 'whether it was my intention "to go to England; for should that not be the case, or should "I decline to send an answer, such proceedings will be taken, "under the Warrant, for my apprehension, as may be directed.' "It was the intimation conveyed to me by these notes which "led me to solicit for a copy of any instruments under which "proceedings were threatened to be taken against me here in "the hands of the Irish Government. I am sure, Sir, your "good-nature will induce you to pardon the trouble I have "given you, occasioned by these communications.

"I am, sir,

"26th Dec. 1804." "Your humble Servant,

"*Sir Evan Nepean.*" "ROBERT JOHNSON."

No. VIII.

"SIR, "*Ardrinn, December 31st*, 1804."

"Sir EVAN NEPEAN has sent me, by His Ex-"cellency's direction, a copy of a letter which he received from "you, dated the 26th inst. and informs me, that he had received "His Excellency's commands to acquaint me, that His Excel-"lency had no objection to granting you leave to go to England, "if no objection should occur to me. As I understand that "your health requires an immediate journey to Bath,* and the "public service does not appear to me to make your remaining "in Ireland necessary, I can have no objection; and I am "therefore

* Mr. Juſtice JOHNSON, in his Letters to Sir EVAN NEPEAN, of the 17th and 26th of December, mentions the ſtate of his health, as *precluding* him from going *immediately* to Bath.

"therefore to signify to you, by His Excellency's command, "that you have His Excellency's permission to go to England "as soon as you think fit."

"I have the honor to be, sir,

"Your most humble Servant,

"*The Hon. Mr. Justice Johnson.*" "REDESDALE."

No. IX.

"DEAR SIR, "*Dublin Castle, 14th Jan.* 1805."

"I send you a copy of a letter which I "have received from Mr. WHITE, the Solicitor to the Treasury "in England, and which contains what it is material should be "communicated to Mr. Justice JOHNSON. I cannot do better "than put it into your hands for the purpose; and I request you "will favor me with Mr. Justice JOHNSON's determination "thereupon with as little delay as possible.

"I am, dear Sir,

"Your most faithful humble Servant,

"*To*———." "A. MARSDEN."

No. X.

(COPY)

THE KING v. JOHNSON.

"SIR,

"I have the honor of your letter of the 5th "instant, which I have shewn to Mr. ATTORNEY GENERAL, "who directs me to say, that Mr. Justice JOHNSON should "be immediately applied to, and it should be notified to him, "that an indictment has been preferred against him in the "Court of King's Bench, and found by the Grand Jury for "Middlesex, that a Warrant for his apprehension is in Ire-"land;—that it is much to be wished that the necessity of "executing that Warrant should be superceded, especially "under the impression that bail could not be regularly taken "upon it in Ireland: That as the object of the Warrant is only "to ensure an appearance and plea to the indictment, and an "appearance on the postea if convicted, if Mr. JOHNSON "will give an assurance (which to obviate all mistake should "be in writing) that he will forthwith cause an appearance to

"be

"be entered, and within the first eight days of the next term "a plea to be put in; and that he will appear in the King's "Bench on the return of the postea in case he should be con-"victed, the ATTORNEY GENERAL thinks he will be justified "in recommending and consenting that the unpleasant extre-"mity of executing the Warrant should not be resorted to; "but if he should refuse to give such assurance, the ATTOR-"NEY GENERAL is of opinion that, however unpleasant it "may be, the Warrant after having been endorsed by some "Justice of the Peace for the county or place where Mr. "JOHNSON is, must be executed, and the consequences, how-"ever painful, will be such as the law will impose, and which "Mr. Justice JOHNSON's refusal to appear and plead volun-"tarily will disable the ATTORNEY GENERAL from pre-"venting."

"I am, Sir,

"*No. 6, Lincoln's-Inn,*
"*9th Jan.* 1805." } "JOSEPH WHITE."

No. XI.

The King,
v.
The Hon. Robert Johnson.

ROBERT JOHNSON, fourth Justice of His Majesty's Court of Common Pleas in Ireland, maketh oath and saith, that he hath lately seen a writing, signed EDWARD MEDLICOTT, purporting to be a return to a writ of Habeas Corpus issued in this cause, on behalf of deponent---in which is set forth a writing, stated by the said EDWARD MEDLICOTT in his said return, to be the copy of a Warrant from the Right Hon. Lord ELLENBOROUGH, Lord Chief Justice of England, &c.---in which copy, as set forth in said return, it is set forth, that it was signed to the said Lord ELLENBOROUGH, by one of the clerks of the Crown-office, that the Hon. ROBERT JOHNSON, late of Westminster, in the county of Middlesex, Esq. one of the Judges of the Court of Common Pleas in Ireland, stands indicted in His Majesty's Court of King's Bench at Westminster, for certain misdemeanors, in composing, writing, publishing, and printing, at Westminster aforesaid, certain scandalous and malicious libels, of and concerning His Majesty's government of Ireland, the Right Hon. PHILIP Earl of HARDWICKE, His Majesty's Lieutenant-general and General-governor of Ireland; the Right Hon. JOHN, Lord REDESDALE, His Majesty's Lord Chancellor and Keeper of the Great Seal, and one of his Privy Council of Ireland; and the Hon. CHARLES OSBORNE, one of the Justices assigned to hold Pleas, before the King himself, in Ireland:--- This deponent saith he hath heard and believes, that the indict-

ment

ment in the said paper mentioned, has been found upon the prosecution of persons employed or concerned in the administation of His Majesty's government in Ireland, and upon the information of three persons, who are all, as deponent believes, attornies of one or more of the Law Courts in Dublin, and were sent, as deponent has heard and believes, from the city of Dublin to the city of London; deponent saith, that the papers with which deponent stands charged as the writer and publisher, and referred to by said writing, called in said return the Warrant of the said Lord ELLENBOROUGH, were first published in the city of London, as deponent has heard and believes, between the latter end of the month of October, in the year one thousand eight hundred and three, and the commencement of January, one thousand eight hundred and four, and appear to bear date within that period, and relate principally to transactions which occurred in Ireland, in or about the twenty-third of July, one thousand eight hundred and three, and immediately subsequent thereto; and this deponent positively saith, that he never has been out of this part of the United Kingdom, but has constantly resided therein since the latter end of October, one thousand eight hundred and two, being one year before the commencement of said publication, and also a considerable time before the transactions concerning which they appear, as deponent believes, to have been written. This deponent saith, that any evidence which this deponent could procure, relative to this deponent's hand-writing, conduct, or character, do arise in the city of Dublin, and not elsewhere; and deponent saith, that he hath no means whereby he could be certain of or compel the attendance of witnesses in the city of London, necessary for his defence.

Sworn before me, this 21st day of January, 1805.

ROBERT JOHNSON.

EMERSON, Attorney.

W. DOWNES.

No. XII.

The King v. *The Hon. Robert Johnson.*

JOHN SWIFT EMERSON, of the city of Dublin, Attorney, maketh oath and saith, that he hath lately seen a writing, signed EDWARD MEDLICOTT, purporting to be a return to a writ of Habeas Corpus, issued in this cause, on behalf of the Defendant—in which is set forth a writing, stated by the said EDWARD MEDLICOTT, in his said return, to be the copy of a Warrant from the Right Hon. Lord ELLENBOROUGH, Lord Chief Justice of England; in which copy, as set forth in said return, it is set forth, that it was

was certified to the said Lord ELLENBOROUGH, by one of the clerks of the Crown-office, that the Hon. ROBERT JOHNSON, late of Westminster, in the county of Middlesex, Esq. one of the Judges of the Court of Common Pleas in Ireland, stands indicted in His Majesty's Court of King's Bench, at Westminster, for certain misdemeanors, in composing, writing, publishing, and printing, at Westminster aforesaid, certain scandalous and malicious libels of and concerning His Majesty's government of Ireland, the Right Hon. PHILIP Earl of HARDWICKE, His Majesty's Lieutenant-General and General Governor of Ireland; the Right Hon. JOHN Lord REDESDALE, His Majesty's Lord Chancellor and Keeper of the Great Seal, and one of his Privy Council of Ireland; and the Hon. CHAS. OSBORNE, one of the Justices assigned to hold pleas before the King himself in Ireland. This deponent saith, he hath heard and believes, that the papers with which the defendant stands charged as the writer and publisher, and referred to by said writing, called in said return the Warrant of the said Lord ELLENBOROUGH, were first published in the city of London, in a series of four letters, signed "Juverna;" the first letter bearing date on the tenth day of Oct. one thousand eight hundred and three, and the fourth letter bearing date on the twenty-eighth day of November one thousand eight hundred and three, in a periodical publication, called Cobbet's Register, as this deponent believes, and this deponent saith, that the said letters are now and have been for a considerable time past publicly exhibited for sale in the principal booksellers shops in the city of Dublin: This deponent having purchased a volume containing the said series of letters, signed "Juverna," at a bookseller's shop in the City of Dublin, where the same was publicly exhibited for sale; and this deponent saith, he hath frequently seen advertisements in the Dublin newspapers, announcing the publication of Cobbet's Register, which contained the said letters, and the sale thereof in the City of Dublin.

Sworn before me this 22d Day of January, 1805.

J. S. EMERSON.

W. DOWNES.

No. XIII.

THE

OPINION

DELIVERED BY

The Honorable Mr. Justice DAY,

IN THE CASE OF

The Honorable Mr. Justice JOHNSON,

IN HIS MAJESTY'S

Court of King's Bench.

IT must be admitted that the present question, in whatever point of view it be taken, is one of most vital importance. On the one hand it concerns most essentially the liberty of every subject in the United Kingdom from the highest to the lowest; on the other hand, the acknowledged object of the statute before us is, *ne maleficia remaneant impunita*. On the one hand occurs a question which touches the most precious birth-right of a British subject; on the other, an object of great public utility. And, therefore, while I readily admit *in limine* that it is our duty so to interpret the statute as shall best repress the mischief and advance the remedy, I claim it to be conceded to me that the Court in its construction is bound to keep steadily in view, as its polar star, the principles of civil liberty, and not to push or strain a construction which may trench thereupon an iota beyond the strict necessity of the case.

In construing this statute I shall adopt the course pursued by my brother DALY, and consider: 1. How the law stood before the passing of the Act. 2. What was the mischief which the law had not at all, or had but imperfectly provided for. And 3. It will then be my duty so to construe the statute as to make the remedy co-extensive with the mischief.

1. At common law there was no power in the State but Parliament that had a right to send any subject out of the realm against his will. It resulted as a natural and necessary corollary

lary from personal liberty, that every British subject had a right to remain in his own country till driven from it by the sentence of the law. The great charter accordingly declared (for it is but a declaration of the common law) that "*nullus liber homo capiatur vel imprisonetur* —— *aut exuletur nisi per judicium parium vel per legem terræ*" And Lord Coke's comment upon *Exuletur* (2 Inst. 47.) is in these words :— "this is a beneficial law and is construed benignly; and, "therefore, the King cannot send a subject of England against "his will to serve him out of the realm; and not even to *Ire-* "*land* to serve him as deputy." And give me leave to add, nor could he be sent out of Ireland into *England* against his will; for as wide as the King's dominions extend (save only Scotland) so wide is the dominion of the common law.

But though the law was thus clearly and unquestionably established in the point, it became necessary in consequence of the arbitrary practices of the House of Stuart to re-assert it in this as well as in other important particulars touching the liberty of the subject, and to throw up fresh fences and new lines of protection round it. Accordingly in the great Habeas Corpus Act of England (31 Car. 2. 2. 12.) we find that important right of the subject insisted upon with a jealous and an ardent anxiety, and as it were *consecrated* to all futurity in the following words; "And for preventing illegal imprison- "ments beyond seas, be it enacted that no subject of this "realm shall or may be sent prisoner into Scotland, *Ireland*, "or any place beyond seas; and that every such imprison- "ment is hereby enacted and adjudged [i. e. declared] to be "illegal"—under the heaviest penalties that I know inflicted by any existing statute short of death. That statute however provides (s. 16.) "that if at any time any person re- "siant in this realm shall have committed any *capital* offence "in Scotland or Ireland, or any of the plantations where he "ought to be tried for this offence, such person may be sent "to such place to receive such trial; in such manner as the "same might have been used before the making of this Act."

This latter clause we see recognize a practice theretofore in use of transmitting *capital* prisoners to be tried in Ireland; a practice stated by the Attorney General to have originated in the prerogative, but which I rather hold to have been a wholesome encroachment upon the common law. Mr. Justice Blackstone lays it down broadly and without qualification, "that no power on earth except the authority of Parliament "can send any subject of England [and give leave again to "add any subject of Ireland] out of the land against his "will;

" will; no, not even a criminal." (1 Comm. 137.) But this I hold to be more curious at this day, than necessary to the present discussion; because even at that period of just jealousy of the Crown and noble ardour for the liberty of the subject, it was thought expedient to legalize the transmittal of *capital* offenders from England for trial to the scene of their crimes. And upon that law we find the King's Bench of England have repeatedly acted. 2. Ventr. 314. Stra. 848, Fitzgib. 111. S. C.

In Ireland the common law remained unaltered by any express provision; and it is remarkable that when the Habeas Corpus Act was obtained in Ireland in 1782, the whole of that important provision " for preventing illegal imprisonment beyond seas," was most unaccountably omitted. I say *unaccountably*; because if a confidence in the House of Brunswick were (as suggested from the bar) the cause of this omission, the generous love of freedom which has hitherto characterized that House would have furnished an equal argument against abridging any of the provisions of that other Magna Charta. However a reciprocal practice of transmittals in *capital* cases obtained here, if not springing from the prerogative, yet sanctioned by that salutary provision of the English Habeas Corpus Act, by the *comitas gentium* which has established the practice among all civilized States, though utterly unconnected, and by sound and substantial policy; a practice analogous to that of back-warrants between county and county, which had long obtained in Ireland before this statute, and so settled amongst us, that it is actually recognized as the law of Ireland by 8 G. 1. c. 9. a temporary Irish Statute since made perpetual.

2. Such then was the state of the law in the present point at the time of the Union. The interests of the two islands becoming altogether identified by that measure, and it being material to create a co-operation between them in the administration of criminal justice, the common Legislature conceived that it resulted from and was comformable to their reciprocal obligations, and common interest, to provide that neither island should continue an asylum for the *fugitives* of the other. That policy had already been long acted upon as between county and county in England, and afterwards as between England and Scotland, and no doubt the wholesome effects thereof had been thoroughly proved and felt. (See 5 Edw. 3. 11. the 23 G. 2. 26. 11. and 24 G. 2. 55. and see 13. G. 3. 31. Brit.) The case of *capital* offenders we have seen had aready been provided for, I will not say in the most constitutional manner, or with sufficient regard to the rights and accommodation of the prisoner; but I join Mr. Attorney General

neral in challenging universal experience to say whether a single instance was ever known of a person *capitally* transgressing in one island, and daring with impunity to shew his head and go at large in the other. I cannot therefore concur with Counsel for the Prisoner in limiting the operation of any part of this statute to *capital* offenders. Their case was not the mischief which *pressed* itself upon the attention of the Legislature; because the Secretary of State's warrant had been found in *capital* cases to answer sufficiently the purposes of the Crown, and on the part of the subject no complaint had been made of any oppressive exercise of that process in such cases. The real and urgent mischief was, that an offender who might commit a dangerous or malignant misdemeanor (suppose a seditious conspiracy or a traitorous and foul libel), or perhaps a very criminal clergyable felony (as a larceny to a great amount) in one country, was sure, by withdrawing himself into the other, to brave and set at defiance all pursuit or prosecution. He was out of the legal jurisdiction; he was beyond the reach of any known process; and he enjoyed, in unmolested security, the fruits as well as the infamy of his crime. The mischief is clearly and distinctly recited in the preamble to the 3d Sect. of this Statute: "Whereas it may often happen that felons and other "malefactors make their *escape* from one island into the other, "*whereby their offences remain unpunished.*" Now it is a maxim in law, that the preamble of a statute must be taken to be true. Try then the question by that test, and it will be found that the view of the Legislature in that preamble could not have been confined to the escape of *capital* offenders only, because it would not be true to say that *capital* offences thereby remained unpunished. "Felons and *other* malefactors" are terms as comprehensive as the English vocabulary can furnish, to express all degrees of offenders from the most trivial trespass up to the most disasterous treason. The legal import of "malefactor," is *offender*, in its most generic sense; but here it is used to import specifically a *trespasser*, because every malefactor *other* than felon can be but a trespasser. I remember in the first argument of this case at my Lord's house we were referred by the Prisoner's Counsel to the *statutum de malefactoribus in parcis* to prove that the Legislature invariably apply the word "malefactor," to one guilty of the *majora crimina*. But upon reference to that statute, and to another of the same reign (1 Westm. c. 20.) it will be found that "malefactor" in the one, and its Norman Synoyme "*Misfesour*" in the other are used in the limited sense of trespasser, and are so translated in every edition of the statutes. So also Lord Hale (2 H. H. P. C. 136, 140.) uses the word "malefactor" repeatedly to signify a trespasser,

trespasser or *bailable* offender. But the flippant answer to all this is, that the language and the laws of our English Justinian are become obsolete, and an appeal is made in a court of law, from the authority of Hale to that of South, of Roscommon and of Shakespeare!—But, if a doubt can still remain, look at the preamble of the 4th sect. which refers to the antecedent, and is but an abstract of it, and you will find, for "felons and other malefactors," a language of the most comprehensive and unequivocal import substituted; "and, for remedy of the "like inconvenience, by the escape into Ireland of *persons* "*guilty of crimes* in Great Britain, be it enacted," &c.—The statute then proceeds to enact, in both clauses, in the same general and comprehensive language: "for remedy whereof, be "it enacted, that if any person, against whom a warrant shall "be issued for *any crime or offence* against the laws of Ireland, "shall escape, &c. into Great Britain," or *vice versâ*.

I feel that much time has been wasted in ascertaining the mischief in contemplation of the Legislature as between the two islands; it floats upon the very surface of both those clauses, and the mere reading of them must satisfy any direct and unsophisticated understanding, that this reciprocity of process is not meant to be limited to any particular degree or order of offence. And I cannot but regret, that Counsel for the Prisoner should dilute, with such a milk-and-water argument, a case too strong to stand in need of sophistry or forced and unnatural construction.—The rest of Mr. Johnson's powerful and impressive argument might disdain to borrow aid from so feeble an associate. For myself, I have no doubt, upon a combined view of the title of the statute, the preambles of the 3d and 4th clauses which recite the mischief, the body of those two clauses which reciprocates the remedy, and the reason and policy which called for them, that the grievance felt by the Legislature was the escape of *offenders* generally (whether "felons or other malefactors," whether high or low in the scale of offences) from the jurisdiction wherein they transgressed, and who thus eluded justice. The statute, by new and constitutional regulations, facilitates the arrest and transmittal of *capital* offenders, who were before liable to both. It takes them out of the hands of the Secretary of State and a King's Messenger, whose authority had been warmly questioned in an early period of this reign, and who might detain their prisoner till it suited their own convenience that he should travel. It puts him into the hands of the known ministers of the law, the Justice of the Peace and the Constable, who are commanded to transmit him *forthwith*.—And it extends, for the first time, the process to clergyable felonies and misdemeanors.

But it is objected for the prisoner, that had the Legislature meant to include bailable offences within the operation of that part of the statute, they would have provided means for bailing the offender in the island to which he had escaped; and the rather, as the subject of bail was so immediately before their eyes. The Legislature (says his council) have studiously and accurately provided in the case of bailable offences, as between county and county; and is it to be imagined, in a case of infinitely greater hardship, as between island and island, that they would not have acted with the same tender and constitutional concern for the rights and convenience of the subject, had not bailable offences been utterly excluded from their contemplation? To this I answer, by admitting at once that such provision could not have been accidentally omitted. It was impossible, where bail was so carefully provided in the same statute, in a case wherein the inconvenience and hazard of the sea did not exist, where that same law had been acted upon upwards of thirty years bewteen England and Scotland without amendment or complaint, it is impossible that such omission could have been by accident or *ex improviso*. But, instead of subscribing to those eloquent but misplaced effusions upon the liberty of the subject, and the rights of man, which enlivened this dull and dry argument, or instead of inferring from such omission, a construction militating with the letter, spirit, policy, and clear meaning of the statute, I draw from it a powerful, and, in my mind, an unanswerable argument, to prove, that *escape* is of the essence, and forms an indispensible ingredient, in the composition of every case to bring it within the statute.—I would not, of course, be understood to use the words *escape* and *fugitive* in their strict and legal meaning; as if an escape had been effected from prison or arrest, or a catchpole were at the party's heels. I apply the words, in a more enlarged and generic sense, to all who, by withdrawing from the jurisdiction of their offences, decline to render themselves amenable to justice.---It is observable, that the very title of the statute presumes guilt in the objects of it; it is, to render more easy the arrest, not of persons *charged* with offences, but of *offenders* who escape; thus inferring, as the law warrants, actual guilt from the flight. Flight, or an escape from arrest for felony, is an acknowledgment of guilt; and, though the prisoner be acquitted of the principal felony, he shall forfeit his goods and chattels, if the jury find that he fled. Now, though flight to avoid arrest for a misdemeanor be not attended with such extreme consequences, still the principle is the same; every man, who is accused, is bound to submit himself to the judgment of the law; and, whether it be a trespass, or whether it be a felony with which he is charged,

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it may, with truth, be said of him who shrinks from trial—*facinus fatetur qui judicium fugit.* I consider a person, who is arrested after escape, *quasi* in execution. Public justice demands his presence where only he is responsible, and the charge can be investigated; and, if it be easy under this statute to imagine a case of hardship, it should be recollected, that the party has no right to complain of a hardship, the legal consequence of his own criminal conduct. If it be a bed of thorns upon which he reclines, it is a bed of his own making. Thus, then, concurring as I do with the rest of the Court, that bailable offences, no less than felonies, are within the mischief of the statute, if we apply it to the case of one who never was in the country where the crime was committed, who never could have fled, escaped, or migrated from it, who is to be found at his post, ready to meet his accuser, who is amenable to process, trial, and punishment for his offences, where by law he is responsible, if we apply the statute to such a case, we impute to the legislature a wanton and outrageous violation of the most sacred birthright of a British subject—we charge them with having, not accidentally, but by design and premeditation, stript the subject of his common law right of bail, in bailable cases, guaranteed, and vainly hoped to have been perpetuated to him by the Habeas Corpus Act. Whereas, if you limit its operation to such as withdraw from the country where they committed the crime, and thus elude the punishment which justice and the public interest demand, you vindicate the statute, and its author, for the omission of bail in the second part of it, and shew that he acted in strict conformity to the principles of the criminal law and of the constitution.

3. I now come to the construction of the statute which enacts the remedy; though I feel that much of this has been anticipated under the two preceding heads of my argument. The Act is compounded of three British statutes, and consists of two parts: the first part establishing a co-operation by criminal process between county and county in Ireland, analogous to the already existing statute law of England; the second establishing the like between island and island, such as has obtained for many years between England and Scotland; and both purporting to bring to justice such offenders as, by quitting the scene of their guilt would "remain unpunished." As far as the title of the statute may have any weight, nothing can be more expressive of the object.—"An Act to render more easy the apprehending and "bringing to trial offenders *escaping* from one part of the "United Kingdom to the other, and also from one county to "another." Then comes the preamble to the first part which is confined to counties—"Whereas it frequently happens that "persons against whom warrants are granted by Justices of Peace

" Peace in Ireland *escape* into other counties out of their juris-
" diction: and it may also happen that persons having com-
" mitted offences *in* some county in Ireland may reside or be
" in some other county out of the jurisdiction *in* which such
" offence was committed, whereby such offenders may easily
" avoid being punished." This preamble plainly refers to two different kinds of *escape*: the one *after* warrant granted, and to elude it, which is the limited legal sense of *escape*—the other a withdrawing out of the county *before* any warrant issued, and even without any direct purpose of avoiding a prosecution, which in a colloquial sense would also be an *escape*. That such is the true construction of this preamble will appear by reference to the two British statutes from which this first part of the Act is taken. The first is a single clause of 23. G. II. 26. s. 11. which enacted, " that in case any per-
" son against whom a legal warrant shall be issued shall *escape*
" *or go* into any other county out of the jurisdiction of the jus-
" tice granting such warrant, it shall be lawful for any justice
" of any county to which such person shall have *gone or escaped*
" to endorse such warrant, and to cause the person against
" whom the same shall have been issued to be apprehended
" and sent to the justice who granted the warrant, or to some
" other justice of the county from whence such person shall
" have *gone or escaped*." This clause among the other defects was soon found to have reached but half the mischief, namely, the case of persons escaping out of the county *after* warrant issued. The Legislature therefore amended the clause the following session by the 24. G. II. 55. which recites that whole clause, and adds, " And whereas such offender may *reside or*
" *be* in some other county out of the jurisdiction of the justice
" granting such warrant *before* the granting the same, and
" without *escaping or going out* of the county *after* such warrant
" granted." And then the statute proceeds to rectify that omission in the very words of the Act before us, by adding in the enacting part those words, " reside or be" to the former words " escape or go into" used in the 23. G. II. It is plain then, considering what the defect was which the 24 G. II. professed to amend, that those words " reside or be, were introduced to meet that *casus improvisus*; to provide for the case of a person who might withdraw from the county where he committed the crime, and " reside or be" in another *before* any warrant granted against him.

Thus then, *reddendo singula singulis*, the purview of this part of our statute may be fairly paraphrased as follows; " Be it enacted that in case any person *(having committed an*
" *offence in any county in Ireland)* against whom a warrant
" shall be issued by any justice of the said county shall *after*

"such warrant issued) escape or go into, or (*before* the granting such warrant) reside or be in any other county, it shall be lawful for any justice of the county where such person shall escape, go into, reside, or be, to endorse his name on such warrant," &c. This in my judgment is the natural and plain interpretation of the clause, commensurate precisely with and going the full length of the mischief, and one not open to some strong objections urged against other constructions. The plain object of this part of the Act is to render amenable to justice, men who by quitting the scene of their crime, whether before or after warrant issued, and shifting into another jurisdiction, would "remain unpunished." 2 Hawk. 183. 6th. Edit.

But when we come to the second part of the statute regulating the co-operation between island and island, it would seem as if the legislature had narrowed somewhat their view as to the mischief to be remedied. The only mischief recited in the third section, is the eluding punishment by *escape*; every other migration from the one island to the other, which had been with a minute precision recited as from one county to another in the preamble to the first part of the statute, is in this preamble omitted, or rather dropt. "And whereas felons and other malefactors may *make their escape* from one island to the other whereby their offences remain unpunished, their being no sufficient provision for apprehending *such* offenders and transmitting them into the island *in* which their offences were committed; for remedy whereof, &c." And least any doubt should remain that such was the mischief, and such alone, which the legislature had it in contemplation as between island and island to remedy, the fourth section recites that mischief in still more pointed terms; "And for remedy of the *like* inconvenience by the *escape* into Ireland of persons guilty of crimes in Great Britain." The obvious motive to this variation of expression was, that the legislature meant to confine that part of the statute which regulates between the two islands strictly to escapes, (whether before or after warrant issued) made for the purpose of eluding justice. Now the consequence of such narrowed construction of this part will be, that, as between island and island, minor and trivial trespasses will in effect be shut out from the sphere and scope of the statute, and none will fall within its *practical* operation, but offences of an higher order. Government it cannot be feared will interfere but in cases which concern the state, or in the *majora crimina*; and as to those paltry misdemeanors and mere personal injuries, which have so excited the sensibility and alarm of counsel, is it to be seriously apprehended that an offender to shun the event of such a prosecution

gi-en would "escape" or "go and reside" beyond seas; or if he did that a prosecutor would for a petty vengeance incur the expence and inconvenience of bringing him back? Such appears to have been Ruffhead's construction of the 13, Geo. III. 31, from which the second part of our statute is taken; and I cannot concur in the reflection cast upon his marginal abstract of that statute, referred to from the bar, not as legislative authority, but as the opinion (*valeat quantum*) of an editor, who from his learned preface, and his numerous and useful references to the reporters appears to have possessed extensive erudition, and to have been deeply versed in the statute law of England. But what closes in my mind all question upon this point, is the following passage to be found in the latter edition of Blackstone's Commentaries; a work not more distinguished for its lucid order and classic elegance, than as an authority in all legal and constitutional questions. After touching upon back-warrants which had long prevailed in England and (we know also in Ireland) without law, and referring to the two British Statutes of Geo. II. which legalized them, the learned commentator thus concludes: "And now by the 13 Geo. III. "31, any warrant for apprehending an English offender who "may have *escaped* into Scotland, and vice versa, may be en-"dorsed and executed by the local magistrates, and the of-"fender conveyed *back* to that part of the United Kingdom "in which such offence was committed." 4 Comm. 292, 12th edit.

I confess those imperfections in the second part of the statute do not strike my short sight, which are relied on with such confidence on the one hand, which with such unjust facility are conceded on the other, and in which counsel on both sides find such convenient refuge from the objections urged against their respective constructions of the statute. It probably would be more to be desired than practicable to establish a reciprocal power of bailing between three countries differing so essentialy in their laws; but supposing no such difficulty to exist, I hold the statute (which was introduced by a lawyer high in office and eminent in character at the English bar,) to have been as well and maturely considered in its provisions, as it is salutary and politic in its principle. It has been in both its parts, the law of the land in Great Britain for many years; it has there stood the test of long experience; and it was reserved for the sagacity displayed through the present case to discover all its imperfections!

But the counsel for the crown contend that this construction is too narrow: and that the body of the statute (which is not to be controled by the preamble) is large enough to embrace not only all fugitive offenders, but another class of offenders,

namely all such as by a constructive presence transgress in one island while they reside in the other. "Be it enacted that if "any person against whom a warrant shall be issued for any "crime against the laws of Ireland shall *escape, go into, reside or "be* in Great Britain, it shall be lawful for any magistrate of "the place in Great Britain where such person shall *escape, go "into, reside, or be*, to endorse such warrant, &c." And in support of this construction, it is asserted, that this latter class of offenders would escape unpunished if not included within the operation of the present statute.

To this extended construction several strong objections rush upon the mind. It is very true that the body or purview of a statute shall not be narrowed by a preamble, because the purview may and often does remedy the mischief, and do more; but it is no less true that where any doubt exists of the true meaning of the purview, the preamble is a safe and sure key to it. In the king v. Cartwright, 4. T. R. 490. The defendant was indicted for an assault upon a revenue officer, under the 9th Geo. II. 35, which enacts, "that for the more impar-"tial trial of any indictment found for an assault committed "*upon a Revenue Officer*, every such offence may be tried in "any county in England." The defendant was found guilty on the count which stated the offence to have been committed in Surry on the prosecutor whom it described to be a *Revenue Officer*, and the venue was laid in Middlesex. On motion to arrest the judgment it was argued that the statute, tho' the words were general, was meant to extend only to assaults on officers in *the execution of their office*. And the Court were all of that opinion, and that *the mischiefs from a contrary determination would be intolerable*. And Buller J. that acute and truly learned judge did not disdain to refer to the *title*, as well as to other parts of the statute, to collect the intention of the Ligislature, and limit the generality of the enacting part.—The 15th and 16th Geo. III. (called the Whiteboy Act) has been well referred to on this point from the Bar. It enacts "that if "any person shall between sunset and sunrise maliciously "assault or injure the habitation, property, goods, or chattles "of any other person, &c. he shall suffer death, &c." This clause, which if construed in the latitude which the words plainly warrant would be worthy only of Draco, has always upon reference to the Judges, been controuled by the title and preamble, and held applicable only to insurgents, and the tumultuous risings described in that preamble.—With respect to Robinson's case, cited by the Attorney General from 2 East, the doctrine laid down there cannot be disputed. But I confess I did not expect to hear that case likened to the present; a case, in which the language was plain and the provisions ob-

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vious, compared to one so doubtful that three Judges have held one way, three more have held the contrary, and the seventh has hesitated. The Attorney General candidly admitted that his construction renders, altogether inoperative and utterly extinguishes the words "escape," "go into," and reside; and he will not deny that such construction ought to be preferred which gives full operation to every word. For there is not a more established rule of law and of common sense in the interpretation of a statute, than that, no clause, sentence, or *word*, shall be superfluous, void or insignificant, if by any other interpretation they may be made useful or pertinent. (1 Show. 108.) By the construction which I submit I have endeavoured to shew that the preamble and the purview, the mischief and the remedy, are precisely commensurate, and every word in the statute is assigned a special operative meaning. But if the statute be extended to men who never visited the island in which the offence was committed, it will follow that the last of those four words "escape, go into, reside, or *be*," would satisfy the statute; and the other three, all very operative words, particularly the word "escape" which the legislature with a fond preference puts forward in the advanced ground of the statute, in the title, and all the preambles, have been introduced for no purpose but to swell the train of the monasyllable "be" or only to be expunged. I am very ready to admit, that a crime may be committed, in one county or island, by a person, while he resides or happens to be in another; for instance, if a man in Dublin send a libel to Cork or London to be published, the publication is his act in Cork or London. But, that such an offender would remain unpunished, without the assistance of this statute, is a propostion which I confidently deny; because (to recur to the same instance) it would be impossible to transmit a libel from this to London, by any imaginable means, which would not amount in law to a previous publication of it in Dublin. The bare delivery of a libel to a messenger or letter-carrier, the dropping it in the Post-office, addressed even to the object of it, who would naturally conceal and not circulate a libel upon himself, any spontaneous emanation of a libel, however limited and circumscribed, amounts to a publication; and such publisher would be answerable to justice, in the jurisdiction where such inchoate act was done, no less than in the other county or island where the libel issued from the press, and the publication became consummated. (5 Co. 126. a. 12 Co. 35. b. 1 Hawk. c. 70. s. 11. 5 Mod. 167.)—The offence of sending and delivering threatening letters seems to come within the same rule and principle of law.—The other instances, by which this proposition has been attempted to be sustained, I apprehend

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have been as unfortunately selected. The case put of a man in Dublin administering poison in London, through the instrumentality of an unconscious and innocent person, will avail the gentlemen but little. Do they forget their own argument in another part of the case, that capital cases are already provided for, and that such a monster (unless it be still an unprovided and dispunishable case) would have been transmissible even before the statute? Nothing, too, could be less fortunate, than the cases of a person in Dublin procuring another to commit an assault, or mayhem, or perjury, or any misdemeanor in London. He is a principal (say they) in the misdemeanor; he must be tried where it was committed; and as he was not within the jurisdiction where the offence was committed, how can he be brought to justice, if an endorsed warrant shall not be allowed to reach him? but this reasoning is grounded altogether in an oversight of the law. At common law, the accessary in one county, to a felony committed in another, was not indictable in either. This miserable defect of the law, which occasioned so gross a failure of justice, demanded the interposition of the legislature; but, when it came under consideration, so cautious were they of invading that fundamental principle of the criminal law, the locality of offences and of trial, that they made the accessary triable, not in the county where the crime was committed, and the principal convicted, but in his own vicinage, in the county where the accessorial felony was committed.—So it is in the case of a trespasser. If he procure a misdemeanor to be committed in another county, whether in or out of the island, the law, it is true, makes him a principal offender. It makes him so, that justice may not be defeated or embarrassed in its efforts to reach him by the doctrine applicable to accessorial offenders; but still the law, consistent with itself makes this accessorial principal indictable only in his own county. He could not be tried in Cork, or in London, or at all for the misdemeanor which he procured to be there committed while he resided in another jurisdiction, and your endorsed warrant would be but waste paper. After you had dragged him, by virtue of this process across the island, or across the sea, you must send him back to Dublin, if your object be to bring him to justice; for in Dublin, only, could he be tried for having procured the assault or the mayhem, or having suborned the perjury, to be committed in London. 2 Hawk. c. 5. s. 19. Doug. 765. King v. Gough.

I cannot, therefore, concur in this interpretation, which most unnecessarily strains the statute to cases of constructive presence. I cannot discover any class or description of offenders, who will escape punishment, by limiting its operation to such

such as withdraw from the scene of their crime into another jurisdiction. The effect of such construction will be, to give the prosecutor an option to change the venue from the jurisdiction where the common law makes the party responsible, into another island; where the party is a stranger, where he can have no character to protect him, and where he has no compulsory means of securing the attendance of his witnesses; a construction, which public justice does not call for, and which exposes the party to very serious hazard, expence, and oppression.—Acts of Parliament, which are made to govern all, are presumed to be intelligible to all. No man of plain sense, unperverted by the refinements of technical reasoning, could be at a loss to understand the objects of a clause which recites, "that malefactors often *escape* from one island "into the other, whereby their offences remain unpunished;" and then provides "for transmitting *such* offenders into the "island *in* which their offences were committed."

Now what is the offence charged here upon the prisoner, and what are its circumstances, as appearing upon the face of the warrant, the return to the Habeas Corpus, and the affidavits made on his behalf, which, as far as they are not repugnant to that return, it is competent for him to read? A misdemeanor, charged to have been committed by the prisoner in England, while he resided in Ireland; the composing and publishing in Westminster a libel, which, if composed by the prisoner, he must have composed in Ireland, which, if published by the prisoner, must have been published by him in Ireland, before he *could* have published it in England; a libel upon the Government, and certain much respected characters in Ireland, more properly triable in Ireland, where its malignity would be best understood and felt than in England; to be established, for the most part, by Irish witnesses, and for which, it is plain, that the prisoner is as open to prosecution in the county of Dublin as he is in the county of Middlesex. Then, with what truth can this be said to be the case of an offender, "whose crime will remain unpunished," if he be not transmitted to Westminster, by virtue of this endorsed warrant?

Gentlemen, on both sides, have indulged themselves in imagining cases. Give me leave to put a possible and no extravagant case, which might place all the *dramatis personæ* in rather an awkward predicament. Suppose the prisoner indicted also in Dublin, for publishing this libel, and that while he was *in transitu* to London, under the present back-warrant, he, and the whole cavalcade, were overtaken at Conway, by a warrant from the Lord Chief Justice of Ireland, backed by a Welch justice. Suppose a scuffle to ensue between the two parties, who should have the prisoner—a classical combat for

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the body—and that one of either party fell in the battle—whether would this be murder, manslaughter, or justifiable homicide? In other words, to which party would the carcase belong?

But we are told that the offence for which the prisoner stands indicted is the publication of that libel in *England*; that this is a distinct offence from the publication of that identical libel (i. e. from the circulation of some copies of the same impression) in *Ireland*; and that he is answerable for those publications only to the respective tribunals of each country. I confess I did not expect to see the fictions of the law thus spread out to catch and entangle any party. It is contended that after a prisoner has been convicted of publishing, suppose a traiterous libel in Dublin, and sentenced to £500 fine and two years imprisonment, it would be competent for the prosecutor to convey him under an endorsed warrant at the expiration of the two years to London, and there to try and punish him again for the same libel published in London, and then, if the prisoner survive all this, that he may be taken to Edinburgh, tried and convicted there also, and his remains perhaps transported for the publication of that identical libel in Scotland! And this is the mild and constitutional use to which a right is claimed of applying this new process, so perfectly analogous to the spirit of the boasted criminal code of this realm! I ask no other concession than this candid avowal to demonstrate the formidable purposes to which a beneficial process is convertible by this extended and comprehensive construction of these clauses. And a better mode of trying a doubtful principle or construction cannot be suggested, than by pushing it to its fair and natural consequences. Upon the ground of its oppressive consequences it was, that the Court decided against the plain words and literal construction contended for in the King v. Cartwright above cited. Upon the ground of the sanguinary consequences to which a literal construction of the Whiteboy Act would lead, we always have looked for the intention of the legislature in the preamble, and construed that clause accordingly. I cannot deny that a judgment had in one island for the publication could not be pleaded in bar of an indictment for the same libel published in the other; though this, considering the present relation of the two islands, is a defect in the law of both which ought to be amended. Between county and county you may plead *autrefois acquit*, or *autrefois convict*; but not so between island, and island, though we are told that they stand in reference to each other as county and county. But admitting the publication in the three capitals of the same libel to be in *law* distinct offences, yet surely in point of *fact* and in common

common sense that publication, whether its diffusion be limited or extended, is but one crime. The train may be laid in Westminster, and there may spring this moral mine of combustible infamy scattering fire and death in every direction; the crime it is true may be flagitious in proportion to the mischief and its extended operation; but still it is but one crime, whatever the extent may be of its ravages, whether it cross the Channel, the Tweed, or only the Thames. To say that the legislature would interfere in such a case and arm with any extraordinary process, a vindictive prosecutor to glut his resentment by multiplied prosecutions and multiplied punishments would be to make the Legislature auxiliary to a malignant and implacable vengeance. The court has no right to get out of a plain case by such refinement, and to be thus astute not in guarding but in construing away the liberty of a subject.

The construction of that branch of the statute of Treasons which concerns the King's coin, is material in this part of the case. It is declared in the following words: "if a man counterfeit the King's money, and if a man bring false money "into this realm counterfeit to the money of England, knowing "the money to be false." It has been held, that though Ireland be distinct from the realm of England, and consequently money brought from thence may within the letter of the statute be said to be brought into the realm; yet, as the counterfeiting is punishable there by the laws of our King as well as in England, the bringing money from Ireland is no more within the statute than if it were part of England. 1 Hawk. c. 17. s. 76.

Much might be said upon the ground that the construction contended for by the Crown converts a prospective statute into an *ex post facto* law. It has therefore been called by counsel for the defendant an occasional act; and certainly such construction exposes the statute to that observation. But the best answer to so foul and unfounded an imputation would be, to say that the statute is not retrospective, that, like the great body of our criminal code, it attatches only upon future offenders, and is not meant to act upon bye gone crimes. Will it be lightly believed, that the Legislature intended to bring past offences under the grasp and scourge of this law? Every venial indiscretion of our early and thoughtless years, committed in the reciprocal intercourse between the two islands! Every assault or other misdemeanor (an instance well put from the Bar) committed by an English militia officer or soldier in 1798, amidst the confusion and dismay of that calamitous period, who, instead of withdrawing to elude justice, was followed by the regret and gratitude of his fellow-subjects whom he had

volunteered to save! I do not say that a case may not happen to justify an *ex post facto* law; but it must be a strong and cogent case, one in which the safety of the state, or its most important interests are concerned; and I add, that such a statute, though the crisis had called for it, would still be contrary to the genius, the spirit, and the practice of the British law.—It has been said, however from the Bar, that this statute adds no new crime to the catalogue, and that an *ex post facto* law is one which makes an action criminal that at the time of doing was innocent. But this I take to be too narrow a definition. Will it be said, that Sir John Fenwick's Bill of Attainder was not an *ex post facto* law, and of the most unconstitutional kind, because it created no new crime, and only acted upon new evidence?

Upon the whole, the present case wants two ingredients essential, in my apprehension, to bring any case within the meaning and spirit of the present statute; I mean *escape* and *impunity*.—The Prisoner has never been in England since the publication of the alleged libel, and therefore has not *escaped* or withdrawn from justice; and if he be guilty, *his offence is as open and exposed to prosecution and punishment* in Ireland as it is in England. I will not say that the provisions of the Habeas Corpus Act are not examinable and open to modification and amendment, as well as those of every other statute. But the legislature will approach that bulwark of our strength and glory with cautious and trembling hands, and will not without imperious necessity disturb a single brick of the proud fabric, which encloses within its sacred shrine the everlasting object of British gratitude and veneration. The 12th and 16th clauses we have seen declare it illegal to send any man a prisoner out of the realm but a *capital* offender; now it was unnecessary to trench upon this inestimable privilege of a British subject farther than to make *all* offenders amenable to justice, whose crimes would otherwise remain unpunished. This construction makes it a salutary and constitutional statute. It acts upon the principle sanctioned and adopted by the Habeas Corpus Act itself, and only extends to misdemeanors the provisions which that statute limited to capital offences. Give it the construction contended for, and you transform a wise and wholesome regulation of reciprocal police into an engine of intolerable oppression.

A great deal more matter presses upon my mind; but I have already been too prolix. I shall conclude with declaring my decided opinion (as decided as it can be, consistent with my unaffected respect for the rest of the Court, from whom I differ), that the Prisoner's case does not come within the statute; but that if I only doubted, I should say as I do now, that the Prisoner ought to have the benefit of that doubt, and be discharged.

POSTSCRIPT.

CONSIDERABLE pains have been taken to remove the impreſſion which the extraordinary conduct of the proſecutors, in attempting to carry off Mr. Juſtice JOHNSON by ſurpriſe, had naturally produced on the public mind; and an effort has even been made to throw upon himſelf the blame of the attempt.

For this purpoſe, while the preſent report was in preparation, a publication appeared in the *Dublin Evening Poſt*, putting into the mouth of the Attorney General ſuch expreſſions, as thoſe who know the candour and love of truth which diſtinguiſh that gentleman, muſt know he never uttered. This *miſtatement*, with very ſlight alterations, and evidently from the ſame ſource, has been printed in a pamphlet, entitled, "Reply of the Right Honourable the "Attorney General of Ireland, to the Arguments of "Counſel for the Defendant, in the Caſe of the King v. "Mr. Juſtice Johnſon," from which, as it has not been openly publiſhed, though privately and induſtriouſly circulated, it becomes neceſſary to lay the following extract before the Public;—

"It was foreſeen, that he," Mr. Juſtice JOHNSON, "might apply for a Habeas Corpus, but not until ſhortly "before the execution of the warrant; and, accordingly, "copies of the neceſſary documents were prepared to be "furniſhed to him on his arrival in town. But he re- "quired them on the ſpot, and they were copied accord- "ingly. This occaſioned ſome delay, and muſt appear to "every one to have been altogether unneceſſary.—To "avoid the inconvenience of taking him out of his "own room, a ſecond magiſtrate was preſent at the "time of the arreſt, who offered to bail him on the "ſpot, or to diſcharge him on his own recognizance; but, "refuſing

"refuſing thoſe terms, he was brought to town, and he "was offered to be lodged in the houſe of the juſtice of "peace who apprehended him, or in any other houſe in "Dublin, which he might think proper to ſelect; and he "was accordingly taken, by his own deſire, to a houſe in "Harcourt-ſtreet. He then ſent a meſſage to me, to re-"queſt that I would permit him to return to Milltown, in "the County of Dublin; and I was at the ſame time in-"formed, that he ſaid it would require three days to pre-"pare the neceſſary affidavits for obtaining a writ of Ha-"beas Corpus. I returned for anſwer, that it was beyond "my authority to ſend him back to Milltown; and as I "knew the term was approaching very near, and that little "further delay would have the effect of poſtponing his trial, "I deſired the magiſtrate to tell him, that there was no au-"thority to detain him in town, and that he muſt conſider "himſelf on his paſſage to England. This had the effect "which it was intended to produce. He went with the "magiſtrate, in whoſe cuſtody he was, to the houſe of the "Chief Juſtice, who immediately ſigned the fiat, and then "ſignified to me that he had done ſo, but that there might "be ſome delay in preparing and ſealing the writ. I there-"fore inſtantly conſented, that upon Mr. Juſtice JOHNSON'S "undertaking to ſue out the writ, and to have it ſerved "that evening, that he ſhould be diſcharged. He accord-"ingly was diſcharged, the writ was afterwards delivered, "and, at the appointed hour the next day, the magiſtrate "was prepared with the return to it.

"I truſt I ſhall be excuſed, when charges of oppreſſion "and kidnapping have fallen in the courſe of the argu-"ment, for ſimply reciting a few facts in my own vindica-"tion; though I cannot help complaining, that it is a little "ſevere, that, when I am ſeeking to bring another man to "trial, I am ſuddenly put upon my own."

The writer, who perſonates the Attorney General, having thus put him upon his country, and that Right Honorable Gentleman not having expreſſed any diſapprobation of his report, the Editor feels it his duty to refute, in the moſt direct way, the miſtatements upon which this defence is reſted.

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In the first place, the reader is referred to the statement made in the Chamber before the Chief Justice, and his learned Assessors, by Mr. Justice JOHNSON, *the day after the arrest*; a statement in which the Attorney General appeared at the time perfectly to acquiesce, when he not only admitted the celerity with which it was attempted to transport Mr. Justice JOHNSON, but actually vindicated that celerity, upon the ground that a more accommodating conduct in the officers might have subjected them to an action for false imprisonment: indeed this apology appeared necessary at that time to appease the indignation which the *uncontradicted* statement of Mr. Justice JOHNSON had excited in the minds of the Court. The officers were likewise present at the statement.

In the next place the reader is referred to the letters which are hereunto subjoined, from Sir HENRY JEBB and JOHN BARCLAY SCRIVEN, Esq. the only persons with the exception of Mr. Justice JOHNSON, the Officers, and the Editor, who were present at the circumstances to which they relate.

The Editor himself does not for a moment hesitate to declare, that his mind was from the beginning strongly impressed with the opinion, that an attempt would be made to carry off Mr. Justice JOHNSON,—an opinion in which the Judge could not be brought to coincide. Under this impression he had on the first notice of the Warrant attended at the necessary office, and had the writ of Habeas Corpus actually engrossed before the arrest was made. On his arrival in town with Mr. Justice JOHNSON on the day of the arrest, the Editor having inserted the copy of the Warrant in the necessary affidavit, instantly repaired to the house of the Chief Justice, in Merrion-square, (where his Lordship waited in consequence of his having been apprized on the part of the Judge that the writ would be required) and obtained his Lordship's Fiat for the writ, at the same time expressing his apprehension to his Lordship, that an attempt would be made to carry off Mr. Justice JOHNSON. With the fiat it was necessary to proceed to the house of the Deputy Clerk of the Crown, to obtain from him the engrossed writ, which still required the signature of the Chief Justice for its allowance: impressed as the Editor was with his opinion of what was intended, it may be believed, that he lost

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no time in returning to the houſe of the Chief Juſtice, where, to his aſtoniſhment, he found Mr. Juſtice JOHNSON, who informed him, that the attempt had been actually made, and that the fidelity of his coachman had enabled him to defeat it, by claiming the protection of the Lord Chief Juſtice, which his Lordſhip knowing the ſteps which had been taken for ſuing out the writ of Habeas Corpus had immediately granted. From this ſtatement, and from the ſubjoined letters, which cannot, with truth, be contradicted, it is very clear,

That no meſſage was ſent to the Attorney General, requiring three days, or any other time whatever, to prepare affidavits for obtaining the writ of Habeas Corpus.

That is was *not* in conſequence of any meſſage or intimation from the Attorney General, that the fiat for the Habeas Corpus was ſo quickly applied for, it having been, on the contrary, obtained by the Editor *before* the arrival of Mr. Juſtice JOHNSON at the houſe of the Chief Juſtice.

That the officer who attended Mr. Juſtice JOHNSON did not know that he was going to the houſe of the Chief Juſtice;

But on the contrary it is obvious, that the attempt (which the Editor had expected) *was* made to carry off Mr. Juſtice JOHNSON by ſurpriſe, an attempt which can beſt be explained by an expreſſion, which the report itſelf puts into the mouth of the Attorney General, "I knew the Term "was approaching very near."—The Term was approaching very near, and had the attempt been ſucceſsful, the Editor would not now have to congratulate his countrymen, that a queſtion in which their deareſt intereſts are concerned, has become matter of ſolemn diſcuſſion, not only at the Bar and on the Bench, but before the great Tribunal of Public Opinion.

"DEAR SIR,

"I HAVE been requested to look into the "argument of the Attorney General, in Judge JOHNSON'S "case, in the Court of King's Bench, as stated in the Dublin "Evening Post of the 28th ult.; and to say, whether the ac- "count, there given, of the arrest and subsequent occurrences "which happened on Friday, 18th of January, agree with my "recollection of such of them as took place in my presence— "to which my answer is, that if the Attorney General stated "the facts in the manner there attributed to him, he must have "been misinformed on the subject. Mr. Justice Bell and Mr. "Medlicott having in a coach passed me on the road to Mill- "town, they arrived at Judge JOHNSON'S House before me, "but waited till I came up, and permitted me to go in to in- "form him of their arrival, while they remained on the road; "immediately after me, Sir Henry Jebb, the Judge's Physician, "came in, and as soon as the Judge was apprised that the Ma- "gistrates were waiting, he directed that they should be "admitted—Judge JOHNSON having, after Mr. Medlicott pro- "duced the warrant, (which he at first objected to) requested "to know to what place he was to be taken; he was informed, "that the directions given to the Magistrates were, to take "him to Dublin; and that he might go to Mr. Medlicott's "house, or to the house of any person he chose—Judge "JOHNSON named his brother's in Harcourt-street: and then "said he wished to send to the Attorney General, to request "that he might be permitted to return to Milltown, to arrange "matters for his departure—Mr. Justice Bell undertook to go "himself to the Attorney General for the purpose, as soon as "they should get to Dublin. But certainly it was not then, "or at any other time, in my presence, stated, '*that it would* "*require three*' (or any other number of) '*days, to prepare the* "*necessary affidavits for obtaining a writ of Habeas Corpus,*' nor "was a word said about applying for such writ. While the "Magistrates were at Milltown, I was no tabsent from the room "in which they were for more than two minutes, when I "went into the next apartment for a pen or some paper. I "accompanied Judge JOHNSON in his carriage to his brother's "in Harcourt-street: when we arrived there I went with him "into his study, when the Judge desired, that as the Warrant "had been executed, his request to be allowed to return to his "own house, which he had left without any preparation, might "be communicated to the Attorney General: either there or "at Milltown, I do not exactly recollect which, I offered to go "to the Attorney General to ask his consent, that the officer "should comply with Judge JOHNSON'S wish; but Mr. Justice

"Bell

"Bell thought it better that he should be the bearer of the "message—but no mention whatsoever was made of wanting "time *to prepare for obtaining a writ of Habeas Corpus.* Very "shortly after our arrival in Harcourt-street, finding that my "assistance was not wanted, and having an appointment on a "reference before Master King, I took my leave. What "passed after my departure I cannot know—but I have every "reason to be convinced, from the conversation which took "place between Judge JOHNSON and me, before the Magis-"trates were shewn into the room at Milltown, that the Judge's "intention of applying for a writ of Habeas Corpus was not "even hinted at, while Judge JOHNSON and the Magistrates "were together."

"*Harcourt-street,* "I am, most truly, yours,
"*12th March*, 1805." "J. B. SCRIVEN."

"J. S. EMERSON, Esq."

"DEAR SIR,

"In answer to your desire, 'that I would mention all I re-"collected of what passed at the time of your arrest on the "18th of January last, at which I happened to be present:'—

"I have a perfect recollection of the entire transaction:—On "my calling that day to visit you, the servant shewed me into "your study, where I saw you, Counsellor Scriven, and Mr. "Emerson your Solicitor; supposing you engaged on business, "I attempted to retire, on which you called on me to remain, "observing to me that I did not intrude.

"In a very short time afterwards, Mr. Bell and Mr. Med-"licott were introduced, who, with some previous apology, "said, they had an order for arresting you: they both ap-"peared in one and the same character; *as people employed to* "*make the arrest*; except that Mr. Medlicott was the person "who had the order, and made the arrest; and Mr. Bell "seemed rather to assume the direction of the proceedings.— "The first circumstance that then took place was, your asking "for a copy of the writ, or order, *(perhaps I mistake terms;)* "they hesitated as to compliance; even as to allowing it to be "read; observing, that on your going to town, you would "have a copy of it from the office: both you and Counsellor "Scriven argued much to convince them, that you were by "law entitled to it; and, on your peremptorily demanding of "him,

" him, (Medlicott,) if he took it upon himself to refuse it; " after some consultation between him and Bell, he allowed " it to be copied.

" You then asked, what you were to do? and was answer- " ed, that you must instantly be brought to Dublin, unless " you would sign a written paper that they produced to you; " this, you said, you could not then do, nor finally determine " upon without the advice of Counsel, who were then absent, " and to whose direction you had determined to submit your " conduct. *No other alternative whatever was offered.* You " then requested to know, what you must do on getting to " town? Mr. Bell replied, that you would be permitted to re- " main at Mr. Medlicott's house, to which Mr. Medlicott as- " sented, and added, or at any other house you should chuse; " you expressed your thanks, and said, you would prefer your " brother's house in Harcourt-street; on which you all pre- " pared to set off to town, and went accordingly to Harcourt- " street.

" I followed in my own carriage, and consequently got into " your brother's in a few minutes after you; Mr. Scriven and " Mr. Emerson were, however, gone from it.—I found you, " Mr. Bell, and Mr. Medlicott, in the back parlour together; " after a very few words of general conversation, you remarked, " that you left your family at Milltown, without informing " them of this transaction; that they had no knowledge of " what had passed, and might be greatly disturbed by what " they might hear; and you desired to know, if you might be " indulged in returning that night to your own house? Mr. " Bell, with much apparent kindness, said, he would go and " see the Attorney General.

" After an absence of some time, he returned, and said, he " had missed of him, as he left home, but he would go again, " and seek for him in those places likely for his being found at " and use his endeavours to see him; he accordingly did so; " and, after some considerable delay, he returned, saying, that " he was sorry to be the messenger of ill news, for that the " Attorney General said, '*he would not interfere.*" On this " you said, 'then I must give directions for my remaining " and sleeping here.' Mr. Bell then said, that he was very " sorry to be obliged to announce more ill news, for that the " orders were, that Mr. Medlicott must proceed with you in- " stantly for England.

" He then took Mr. Medlicott apart, when they consulted to- " gether for some time, and Mr. Bell went away.

" When

"When he was gone, Mr. Medlicott said, you must go directly to England, and requested pen, ink, and paper, and that a messenger might be procured to take a letter to his house.

"You spoke of the hardship on you of this unexpected hurry; that you had not left money with your family, nor had a guinea in your pocket, and that it would be absolutely necessary for you to call at one or two places before your departure. Mr. Medlicott said, he would call any where with you; and was then shewn into the office or street parlour to write his letter, leaving you and me in the back parlour together; you appeared much agitated; walked up and down the room; observed that this proceeding was a sort of kidnapping, and that you were taken by surprize; that if you could see Lord Chief Justice Downes it would not be suffered, and you did not know what to do. I asked you why you might not see him, as he was certainly at home? and you answered, you apprehended Mr. Medlicott might not agree to go there, and you therefore requested, I would direct your coachman to drive you there.

"I accordingly desired Mick to bring the carriage to the door, and not to heed any directions that might be given to him as to where he should go; but whenever you got in, to drive directly to Judge Downes, in Merrion-square.

"Mick did his business very well, and saved you a disagreeable passage in a wherry, that I understand was kept in waiting in deep water, to avoid the delay of a few hours for the packet, which was to sail with the next tide.

"As to what you ask relative to any mention about Habeas Corpus, or the delay of three days to prepare a writ, there was not a word of any such matter; nor any reason offered by you for wishing to return to Milltown, *except as before*, to relieve the anxiety of your family, who were totally unacquainted with what had happened, and to prevent the distress which what they might hear must otherwise create in your absence.

"I am, my dear Sir,

"*Stephen's-green*, "Your's most truly,

"*March* 15th, 1805. "HEN. JEBB."

"P. S. Mr. Medlicott certainly did not consent, nor did he know you were going to Judge Downes's."

"To the Hon. Mr. Justice JOHNSON."

FINIS.

T. Burnside, Printer, Lower Liffey-street. Dublin.]